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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 541

ALLIED CLEANING CONTRACTORS, INC.,
Fourth-Party Defendant,
Petitioner,

v.

ALLIED MAINTENANCE CORPORATION, Third-Party Defendant, TRANS WORLD AIRLINES, Defendant and STEVE KOZMAN, Plaintiff,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes, Rules and Regulations Involved	3
Statement	3
Reasons for Granting Writ	4
Conclusion	21
Appendix A—Opinions and Memoranda Decisions Below	22
Appendix B—Statutes	41
Appendix C—Industrial Code Rule No. 21	44

CITATIONS

Cases:

Banks v. Central Hudson Gas & Elec. Corp., 224 F 2d 631, cert. den. Central Hudson Gas & Elec. Corp. v. Banks, 350 U. S. 904 21

Bobbey v. Turner Const. Co., 308 N. Y. 890 .....17, 18, 19

Broderick v. Cauldwell-Wingate Co., 305 N. Y. 872 .. 20

Burris v. American Chicle Co., 120 F. 2d 218 ....5, 10, 14, 16, 18

Chideckel v. Dime Savings Bank of Williamsburgh, 103 N.Y.S. 2d 616 18

Dell 'Olio v. Mastronardi, 267 App. Div. 829 18

Dick v. Sunbright Steam Laundry Corp., 307 N. Y. 422 20

Duncan v. Twin Leasing Corp., 283 App. Div. 1080 leave to appeal denied 307 N. Y. 943 ....16, 17, 18, 19

PAGE

Gambella v. John A. Johnson & Sons, Inc., 285 App. Div. 580 5

Hawley v. Alaska Steamship Company, 236 F. 2d 307, 311 12
Hente v. Shercoop, 289 N. Y. 140 18
Homin v. Cleveland & Whitehall Corp., 256 App. Div. 187 rev'd on other grounds, 281 N. Y. 484 16

Johnson v. Erie Railroad Company, 236 F. 2d 352, 356 7
Jolles v. 3720 Corporation, 163 Misc. 51 18

Kingda v. Charles F. Noyes Co. Inc., 260 N. Y. 521 .. 16
Koenig v. Patrick Const. Corp., 298 N. Y. 313 12

Lowenhar v. Commercial Outfitting Corp., 260 App. Div. 211, affd. 285 N. Y. 671 16

McKay v. Pedigree Fabricks, Inc., 74 N.Y.S. 2d 385 .. 18
McManus v. Board of Ed. of City of Rochester, 106 N.Y.S. 2d 51 18
Marrone v. John A. Johnson & Sons, Inc., 283 App. Div. 1114 5
Miller v. Pennsylvania Railroad Co., 236 F. 2d 295 .. 20
Morris v. Attula, 74 N.Y.S. 2d 386 .....14, 18

Osborne v. Salvation Army, 107 F. 2d 929 16

Phoenix Bridge Co. v. Creem, 102 App. Div. 354, aff'd 185 N. Y. 580 13
Pollard v. Trivia Building Corp., 291 N. Y. 19 .....10, 16

Rufo v. Orlando, 309 N. Y. 345 .....10, 17, 18

Semanchuck v. Fifth Avenue 27th St. Corp., 290 N. Y. 412 .....16, 17, 18, 20
Stern v. Great Island Corp., 250 App. Div. 115 16
Storoz v. International Business Machine Corp., 91 N.Y.S. 2d 367, affd. 276 App. Div. 1079 .....13, 14

PAGE

Teller v. Prospect Heights Hospital, 280 N. Y. 456 .. 8, 10
Thompson-Starrett Co. v. Otis Elevator Co., 271 N. Y. 36 20
Vooth v. Castroviejo, 206 Misc. 85, Affd. 285 App. Div. 867, leave to appeal denied, 308 N. Y. 1052 15
Walters v. Rao Elec. Equip. Corp., 289 N. Y. 57 ....16, 17, 18, 20
Wischnie v. Dorsch, 296 N. Y. 257 .....18, 19
Williams v. Rhode Island Corp., 281 App. Div. 618 .. 5
Zuccelli v. City Contracting Co., Inc., 286 App. Div. 842 5

Statutes:

Federal Business Records Act, 28 U.S.C. § 1732 ..2, 3, 5, 7
Federal Impleader Statute, Rule 14 F.R.C.P., 28 U.S.C. 5
New York Impleader Statute, § 193a C.P.A. 5
New York Labor Law:
§ 27a 2, 9
§ 28 ..... 2, 9
§ 29 ..... 2, 9
§ 202 .....2, 3, 4, 5, 8, 9, 11, 12, 15, 16, 17, 18, 19
§ 241 .....16, 18, 19
§ 316 .....18, 19
New York Vehicle and Traffic Law:
§ 59 18
New York Workmen's Compensation Law:
§ 3, Groups 3 and 13 19

Rules and Regulations:

Industrial Code Rule No. 21 .....2, 3, 8, 9, 13, 15
As amended 1933 11
As amended 1944 .....2, 3, 8, 9, 11, 15

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No. ———

Allied Cleaning Contractors, Inc.,
Fourth-Party Defendant,
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v.

Allied Maintenance Corporation, Third-Party Defendant,
Trans World Airlines, Defendant and Steve Kozman,
Plaintiff,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled action on August 6, 1956.

Citations to Opinions Below

The judgment of The District Court was entered upon a jury verdict. The majority and dissenting opinions of the United States Court of Appeals for the Second Circuit are unreported to date and appear in the appendix hereto

at pages 22 to 39. The majority and dissenting memorandum decisions on the petition for rehearing are unreported and also appear in the appendix hereto at page 40.

Jurisdiction

The judgment of The United States Court of Appeals for the Second Circuit was made and entered on August 6, 1956. The order of The United States Court of Appeals for the Second Circuit denying the petition for rehearing was made and entered on August 27, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

I. Whether history statements regarding the accident in issue in respondent Kozman's medical records are admissible in evidence against petitioner, and Kozman's co-respondents under the Federal Business Records Act, 28 U.S.C. § 1732, and whether the Court below was justified in failing to fully consider this issue in the light of the record.

II. Whether petitioner and respondent Kozman's co-respondents can be held to have violated the New York Labor Law Sec. 202 when they complied with the provisions of Industrial Code Rule 21 promulgated by the New York Board of Standards under authority vested in it by the New York Labor Law Sec. 27a, 28, 29 and 202.

III. Whether respondent TWA could be entitled to indemnity from respondent Allied Maintenance Corporation and whether respondent Allied Maintenance Corporation could be entitled to indemnity from petitioner upon the theory advanced by the Court below in affirming respondent Kozman's judgment against respondent, TWA.

IV. Whether a violation of New York Labor Law Sec. 202 by respondent, TWA would render it an "active" tort-feasor per se who could have no right to indemnity at common law.

V. Whether the indemnity provision in the contract between respondent TWA and respondent, Allied Maintenance is sufficient to entitle respondent TWA to a judgment over against respondent, Allied Maintenance Corporation.

VI. Whether the errors in the Trial Court's charge to the jury on the first cause of action asserted by respondent, Kozman against respondent TWA would at the very least require a new trial on the issues in the impleader actions despite any affirmance of the judgment in favor of respondent, Kozman.

Statutes Involved

28 U.S.C. § 1732 (The Federal Business Records Act); N. Y. Labor Law § 202 (The Window Cleaners Statute) and Industrial Code Bulletin Rule No. 21 (The Window Cleaners Code).

Statement

Since the majority opinion's statement and factual account (pp. 22-25, *infra*) recite the background and facts of this case we will not encumber this petition by repeating them here, with the exception that the testimony referred to in the last paragraph of the factual statement will be set forth verbatin and without interpretation. It is as follows:

> "Q. Mr. Kozman, did this ladder slip from the feet? A. It did. As it started falling, I was working on it—
>
> Mr. Reilly: I object to this under the guise of cross-examination. One can't elicit self-serving declarations.

Mr. Green: I am not trying to, I am only concerned with my client.

The Court: I will let the witness answer. Just answer the question.

Q. Did the ladder slip from the bottom? Did the feet slip? A. It slipped to the right side. I was blown off.

Mr. Green: I move to strike it out.

Q. My question was, sir, did the feet of the ladder slip? A. No." (165)*

Reasons for Granting Writ

I

Allied Maintenance and Allied Cleaning extensively argued in the Circuit Court that the Trial Court erroneously admitted into evidence insofar as they were concerned, hearsay in the form of written history statements in plaintiff's hospital record, his physician's notes and reports, and history testimony by the same physicians, and that this hearsay formed the basis for the submission to the jury of plaintiff's Labor Law (Section 202) cause of action and the impleader actions.

The Circuit Court refused to concern itself with this question by calling the contents of the reports trivial and unprejudicial to the impleaded defendants (it made no comment on the oral hearsay testimony), and by finding a ground upon which to affirm the verdict which was not even charged by the Court nor considered by the jury. (See e.g. Allied Cleaning Contractors, Inc.'s request to charge #17 which was ostensibly granted (278)).*

A fair reading of the record must convince this Court that the entire verdict was tainted by this hearsay, if improperly admitted, and that the Circuit Court's refusal

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* Numerals in parentheses refer to pages of appendix of fourth-party defendant-appellant in the Court below.

to consider this question of whether medical record history statements may be admitted against third persons under the *Federal Business Records Act*, 28 U.S.C. § 1732 should not prevent this Court from doing so.

The heart of the oral and record hearsay testimony was its continued reference to the slipping of the ladder upon which plaintiff was working (117-145) as contrasted to plaintiff's testimony that the feet of his ladder did not slip (165). All of this hearsay was introduced into evidence by TWA for the prime purpose of drawing liability unto itself under the Labor Law cause of action on the theory that absence of shoes on the ladder caused it to slip and fall as a consequence of which TWA could receive indemnity under an analogous case (*Burris* v. *American Chicle Co.*, 120 F. 2d 218). This idea of a defendant's assuming liability upon a theory which would allow it to pass it on to an impleaded defendant is not a new one (see e.g. *Zuccelli* v. *City Construction Co., Inc.*, 286 App. Div. 842; *Williams* v. *Rhode Island Corp.*, 281 App. Div. 618; *Gambella* v. *John A. Johnson & Sons, Inc.*, 285 App. Div. 580); that is why impleader statutes such as Rule 14, F.R.C.P. and Sec. 193a C.P.A. (N. Y.) give an impleaded defendant all the rights which a third-party plaintiff has against plaintiff (*Marrone* v. *John A. Johnson & Sons, Inc.*, 283 App. Div. 1114).

In stating that the record and report histories were offered by TWA and received in evidence only for the purpose of showing that they made no mention of the "gust of wind", the Circuit Court entirely disregards the contents of the record which shows:

TWA offered this hearsay for all purposes and against everyone (176); it was offered in context with TWA's repeated questions concerning the lack of shoes on the ladder and conditions which might cause a ladder to slip (93-98, 104-105, 152-155); TWA requested charges that *it, TWA, must* be liable to plaintiff under Section 202 if

the accident happened due to lack of shoes or another suitable means to prevent the ladder's slipping and that it was entitled to indemnity in such event (282, 284), which requests were granted (262-263) and charged (303,* 310-311**). The Trial Court refused to charge, that the doctor's oral testimony and written histories could only be used to contradict plaintiff's testimony or credibility but that such "evidence" could not be used as affirmative proof that the ladder slipped, and that it could not be found that a defect in the ladder or equipment was a proximate cause of the accident, especially so on the issues in the impleader actions (276-279, 286-287, 262).***

When the Circuit Court states that "The issues between TWA and the impleaded defendants as formulated by the judge in his charge make no mention of the "slipping of the ladder" within the seven "carefully framed" issues it ignores the record, for not only did the Trial Court fail

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* If the accident resulted from the slipping of the ladder, which could have been prevented by the use of boots or other safety devices or by the holding or support of the ladder by another, it was not only a violation for failure to supply such requisites, but a violation to permit its use without such support or such devices.

** "Five, was the equipment supplied by Allied Cleaning Contractors proper for the job to be done, and was it in proper condition and properly tended as required;

"Sixth, was Allied Maintenance or were its agents, (Allied Cleaning Contractors (third), . . . negligent and if so was their negligence the proximate cause of plaintiff's injury?

"If your answer is yes, then I charge you that Allied Maintenance is required to indemnify TWA . . .

"Seventh, was Allied Cleaning Contractors negligent, and, if so, did its negligence proximately result in the accident complained of? If so, and if Allied Maintenance must indemnify TWA for the negligence of Allied Cleaning Contractors, Inc., then Allied Cleaning Contractors is required to indemnify Allied Maintenance Corporation . . ."

*** Allied Cleaning Contractors, Inc.'s requests to charge 3, 4, 13, 18, 23.

Allied Maintenance Corporation's requests to charge 4, 6.

to charge that the physician's testimony could not be used against the impleaded defendants, but the fifth, sixth, and seventh of the issues mentioned clearly show that the Trial Court was speaking of the very ladder in question when he spoke of the "equipment" and "it", and that he indicated no intention whatsoever to separate his charge in the main action from that in the impleader actions, for if he did, he would have defined the terms "equipment", "proper", "proper condition", "properly tended" and "negligence" as respects the impleaded defendants. Of necessity the jury had to refer back to the charge in the main action for that purpose. The Trial Court so intended (304, 309, 311). The cumulative effect of the foregoing is such as to make the possibility of confusion too great to disregard. *Johnson* v. *Erie Railroad Company*, 236 F. 2d 352, 356.

Even though the Circuit Court chose to disregard the vital question of whether a history report in a medical record can be admitted against third persons under the *Federal Business Records Act*, 28 U.S.C. § 1732, we believe that this case squarely raises the issue and the members of the bench and bar should have it answered so that they may be guided accordingly in the future.

This need is highlighted by a part of the opinion below apparently directed at the impleaded defendants who did not wish to cross-examine the physicians. In it the Circuit Court states: "Both physicians whose notes and reports were introduced were witnesses at the trial and subject to cross-examination concerning Kozman's account of his version of the accident."

What the Court below overlooked however is the elementary principle that cross-examination of hearsay only elicits more hearsay and that there is a rule against the admission of hearsay because it deprives one of the right to cross-examine the *source* of the statement and not because the repeater of the statement cannot be cross-examined. Allied Cleaning Contractors, Inc. went to the source. It

asked plaintiff himself, while under the solemnity of his oath, whether the feet of the ladder slipped and plaintiff answered "No" (165). If Allied Cleaning can be bound by the testimony of those who knew of the accident only by what plaintiff told them outside of the sanctity of a courtroom, it should be let know so that it may be relieved along with many others of its delusion that patent hearsay has no place in a court of law.

II

That part of the Court's opinion of affirmance which determines that there was sufficient evidence to submit the statutory (Labor Law § 202), cause of action to the jury despite the fact that the means provided to plaintiff for the performance of his work was approved by the regulations (Industrial Code Rule No. 21), was a clear disregard of the provisions of Section 202 and Rule 21, and the holdings of the New York Court of Appeals in *Teller* v. *Prospect Heights Hospital*, 208 N. Y. 456 and *Pollard* v. *Trivia Building Corp.*, 291 N. Y. 19.

The peculiar and dangerous circumstances which this Court sees as the factor which converted the safe means which conformed to the Code into a device abhorrent to the Statute was the sudden, unexpected and unanticipated gust of air which struck plaintiff before he had a chance to avail himself of the use of an additional safeguard Allied Cleaning, his employer, provided for him, a man to hold the ladder.

Two questions thus present themselves: (A) May a defendant be held liable for violation of Section 202 when he has provided equipment which complies with the provisions of Rule 21; and (B) can a sudden set of circumstances created by an outside agency instantaneously render means which conform to the provisions of Rule 21 improper and violative of Section 202, merely because the window cleaner's accident would not have happened as

it did if he had been using some undefined and ephemeral other sort of means.*

(A) The Court below in its opinion determined that devices other than those specified in the Rules can nevertheless be used in violation of the Rules and thereby comply with the Statute if they can "be reasonably deemed better adapted for the protection of the window cleaner." Thus, in effect, the Circuit Court has substituted a jury for the Board of Standards and Appeals as the "authority" in determining what type of means or appliances are proper for window cleaning work; and in this case the jury was, according to the opinion, completely competent to determine that other means were more proper than ladders, without hearing one word of testimony about the propensities or capabilities of such other means.

The relegation of this function to the jury clearly disregards the provisions of Section 202 which constrains the phrases "safe means", "other means" and "safe manner" to those "required and approved by the board of standards and appeals" or "in conformity. . . . with the rules of the board of standards and appeals".

Rule 21, itself, which as the Trial Court charged (301) has the force and effect of law (Labor Law, § 28, subd. 4), clearly and explicitly commands "*windows shall be cleaned only by the methods prescribed by these rules*" (Rule 21-3.1). The trial court so charged (301).

It is thus clear that the function of determining what is safe and proper was entrusted not to the hands or fancy of a lay jury, whose understanding of the relative merits of various types of equipment must by definition be limited. On the contrary, this responsibility was exclusively delegated to a body of experts who have the capacity, capa-

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* See letter to editor of New York Law Journal written by the attorney for plaintiff and printed in September 20, 1956 issue at page 4.

bility and facilities for examining, investigating, testing and deciding which means and methods are best suited for use in a particular industry; and upon the knowledge so acquired arrive at a uniform set of standards to be followed by that industry (Labor Law § 27a, 28, 29). "That was but a permissible delegation of the power to make appropriate administrative regulations to carry out the provisions of the statute" *Burris* v. *American Chicle Co.*, 120 F. 2d 218. 222. This delegation to the board of exclusive power to prescribe means and methods is in accordance with the statutory objective, the prevention of accidents. *Rufo* v. *Orlando*, 309 N. Y. 345, 350.

In *Teller* v. *Prospect Heights Hospital*, 280 N. Y. 456, 459 it is specifically stated that the violation of Section 202 for failure to supply "safe means" can be predicated only upon a complete failure to supply any of the means specified in Rule 21.

> "The statute does not in terms provide that anchors shall be attached to the windows of the building nor does it provide any particular device or contrivance that shall be provided to make it safe for the window washer to clean the window from the outside. *We are required to look to the Industrial Code* . . . to learn what rules of The Industrial Board are applicable, what means have been required by the rules of the Industrial Board to be furnished and what devices have been or may be approved for the safety of persons cleaning windows." (Emphasis supplied)

As to the excerpt from *Pollard* v. *Trivia*, 291 N. Y. 19, 23-24, which the opinion cites as authority for its holding that methods other than those specified in Rule 21 are permissible, it must be noted that such statement is dicta; and even if it were not, it would not apply to the accident in question since Rule 21-3.1 as it read on the day of the accident, December 15, 1950, (Rule 21 as am. 1944) stated: "windows shall be cleaned *only* by the methods prescribed

by these rules", while identically numbered at the time of the *Pollard* accident (Rule 21 as am. 1933) read:

> "All safety devices, that are used for window cleaning operations, shall be subject to the approval of the Industrial Board.
>
> "Exception: Safety devices and methods of cleaning windows heretofore (before April 1, 1933) in use, other than those specified herein may be used if approved by the Industrial Commissioner."

A comparison of the 1933 Rules with the 1944 Rules indicates that the former Rules were designed to accomplish a gradual transition from a varied complexity of many methods and means used in the window cleaning business to a select and uniform group of methods and means without requiring industry to immediately discard its outdated but nevertheless costly equipment. The 1944 amendment, in effect, declared that the period of transition was ended, or would end in the immediate future, and gave sanction only to those means contained in the new Rules and no others (See e. g. Rule 21-3.10).

As for the last paragraph of Section 202 being authority for devices other than those specified by the Rules, as the opinion below implies; a careful reading of it discloses that it merely states that the failure of the Board to enact Rules supplementing the Legislature's reference to anchors in the first paragraph (devices . . . to be installed on public buildings) and their complement safety belts (devices to be worn by window cleaners) does not absolve one of the duty to provide one of the other devices sanctioned by the Rules.

(B) If this Court adheres to the premise that means *specified* which comply with the Rules may nevertheless be violative of the Statute, the Court must next consider whether the question of adequacy or inadequacy of the means can be made to hinge upon a sudden and unex-

pected set of circumstances which places the user of the otherwise adequate equipment in a position of danger to which he may or may not have been exposed if he had been using some other type of equipment.

In excusing the plaintiff's failure to have someone hold the ladder, the opinion notes that the circumstance which precipitated the accident was sudden and unexpected and arose without warning so that plaintiff was unable to call upon a man to hold the ladder.

Since the device being used by plaintiff was adequate it cannot be said to have become instantaneously inadequate merely because the accident would not have happened in the exact manner which it did if plaintiff had been using some other type of equipment. If plaintiff had been working with a belt, boatswain's chair or swinging scaffold, he undoubtedly would not have fallen to the ground when the unexpected occurred, but he may have been buffetted and battered against the hangar door. Witness what happened to Koslowsky (180).

Section 202 does not make those charged with a duty under it the insurers of a window cleaner's safety and require them to protect him against every conceivable possibility or probability of accident. (See *Hawley* v. *Alaska Steamship Company*, 236 F. 2d 307, 311.) "The legislature . . . to guard against *the known hazards* of the occupation, required the employer to safeguard the workers from injury caused by faulty or inadequate equipment." *Koenig* v. *Patrick Const. Corp.*, 298 N. Y. 313, 319.

It is probable or possible that a window cleaner's ladder may be dislodged when a sidewalk cellar or sidewalk elevator door upon which the ladder rests is suddenly opened without prior warning, or when a preoccupied pedestrian walks into it, or in a situation such as present in the case at bar, his ladder may be bumped by a TWA employee or a fellow employee. In these instances it

could not be said that an inadequacy in equipment caused the accident merely because it happened, and that Section 202 had thereby been violated because the accident would not have happened as it did had another type of equipment been used. The same applies to the case at bar. The fact that "but for" the use of a ladder there would be no accident of the type in question does not render the use of the ladder violative of Section 202. (See *Storoz* v. *International Business Machine Corp.*, 91 N.Y.S. (2d) 367, aff'd. 276 App. Div. 1079.)

The amendment of the Labor Law and Rule 21 by the peculiar and sudden circumstance doctrine authored by the opinion, even though it serves to give this plaintiff's verdict legitimacy, can only serve to create confusion in place of uniformity in the window cleaning industry, and throw it back to the period before Laws, Rules and Regulations governing it were enacted.

If the opinion be allowed to stand as precedent, Rule 21 will no longer set the standard, and the uniformity* which is the keynote of the statute will effectively be eliminated. The often illiterate window cleaner will be faced with a different and understandardized type of equipment at each new job; if he fails to master it and injury results, he will find little comfort in hearing that it is just as adequate as the four types of equipment prescribed by Rule 21 with which he has become familiar. It would appear that the majorities concern for Kozman will in the future come back to haunt Kozman's fellows, for if they sustain injury while using other than required and approved equipment it will always be for a jury to speculate whether the unapproved equipment was just as good or better than the approved type.

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* See *e.g.*, 2nd and 3rd unnumbered paragraph of Section 202 which allows the board to make rules exempting a building from the provisions of Section 202 and Rule 21, but allow it to grant a variation from the Section and Rule only where windows can be and are to be cleaned from the inside. *Vooth* v. *Castroviejo*, 206 Misc. 85, affd. 285 App. Div. 867, leave to appeal denied, 308 N. Y. 1052.

It is also to be noted that a violation of either Section 202 or Rule 21 is a violation of the New York Penal Law (§ 1275). Can it be said in circumstances such as are present here that where a lessee or employer has provided the equipment prescribed by Rule 21 and thereby compiled with Section 1275 of the Penal Law that he has violated Section 202 and has thereby violated the same Section 1275. If the premises stated by the Court below are correct this query would have to be answered in the affirmative. We think it further highlights the absurdity of the opinion below and its need for review.

III

If plaintiff's verdict can rest on the theory that the sudden blast of air *from TWA's plane* without any prior warning *by TWA* caused the adequate ladder to become inadequate and violative of Section 202, it must follow that TWA's liability was predicated on its "active" negligence thereby depriving it of any right of indemnity.

What is "passive" as contrasted to that which is "active" negligence is "the liability which results from the mere omission of a legal duty (which) is to be distinguished * * * from that which results from personal participation in an affirmative act of negligence or from physical connection with an act of omission by knowledge of, or acquiescence in, it on the part of the original contractor." *Phoenix Bridge Co.* v. *Creem,* 102 App. Div. 354, aff'd. 185 N. Y. 580.

Since the "negligence" found was that which resulted from the act of TWA in warming up the plane without warning, thereby causing the ladder to become inadequate where it had previously been adequate, it must follow that TWA personally participated in the combination of circumstances which the Court below calls violative of Section 202. At the very least, TWA must be deemed to have phys-

ical connection with any omission to provide other devices under the circumstances, since TWA and TWA alone caused the circumstances to arise and failed to warn of their imminence. *Morris* v. *Attula,* 74 N.Y.S. 2d 386.

It is a glaring inconsistency to hold that the suddenness of the event excused plaintiff's failure to avail himself of the use of a man to hold the ladder, a safe means provided by his employer, and at the same time determine that the employer was "actively" negligent and the precipitator of the incident "passively" negligent. On the contrary, it would appear that the employer here is the "passive" party since its equipment became "inadequate" only when unexpectedly acted upon by an agency solely and exclusively within control of TWA. *Storoz* v. *International Business Machine Corp., supra.*

Burris v. *American Chicle Co.,* 120 F. 2d 218, is not authority which sanctions the right to indemnity in the case at bar; it is authority to the contrary.

In that case the sole cause of the accident was the breaking of a scaffold rope supplied by the employer, Ashland, which Ashland directed plaintiff to use after plaintiff had called Ashland's attention to the rope's dangerous condition. American Chicle had no connection whatsoever with the scaffold, scaffold rope, or any circumstance which caused the accident.

> "Without any *active participation in the* wrongful acts or omissions of Ashland, Chicle has become responsible to the plaintiff for the consequences of Ashland's own wrong and has the right to be indemnified by the wrongdoer." (Burris, *supra,* p. 222.)

Since the circumstance which caused the adequate ladder to become inadequate was caused solely by TWA, it would seem that TWA must be at the very least an "active" *tort feasor* under the *Burris* case.

IV

That part of the opinion below which holds that a violation by TWA of Section 202 would not *per se* make it an "active" *tort feasor,* who has no possible right to indemnity as a matter of law, is contrary to clear intent of that Section and the precedents laid down by the New York Court of Appeals in analagous cases.

As was pointed out to the Court below, the only Section in the New York Labor Law analogous to Section 202 (Protection of persons engaged at window cleaning) is Section 241 (Protection of employees on building construction or demolition work including excavation work in connection therewith). Both Sections impose duties for the protection of persons engaged in specified hazardous employment; their violation is negligence *per se* and contributory negligence and assumption of risk are not defenses. The duties imposed by each are absolute and nondelegable, and it makes no difference whether the person who does the work is an independent contractor or a workman (Sec. 202; *Lowenhar* v. *Commercial Outfitting Corp.,* 260 App. Div. 211, aff'd 285 N. Y. 671; *Homin* v. *Cleveland & Whitehall Corporation,* 256 App. Div. 187, revd. on other grounds 281 N. Y. 484; *Pollard* v. *Trivia Building Corp.,* 291 N. Y. 19; *Stern* v. *Great Island Corporation,* 250 App. Div. 115; *Osborne* v. *Salvation Army,* 107 F. (2d) 929; *Kingda* v. *Charles F. Noyes Co., Inc.,* 260 N. Y. 521; *Burris* v. *American Chicle Co.,* 120 F. (2d) 218: Sec. 241; *Walters* v. *Rao Electrical Equipment Corp.,* 289 N. Y. 57; *Semanchuck* v. *Fifth Avenue 27th St. Corp.,* 290 N. Y. 412; *Duncan* v. *Twin Leasing Corp.,* 283 App. Div. 1080, leave to appeal denied 307 N. Y. 943; *Rufo* v. *Orlando,* 309 N. Y. 345).

In construing Section 241, The New York Court of Appeals stated in the *Semanchuck* case at page 421:

> "that when the Legislature in Section 241 of the Labor Law imposed upon both the owner and con-

tractor the positive command to provide the protection deemed appropriate by the Legislature in building and construction work, the purpose of the command and the nature of the duty created indicated a legislative intent that the general standards of "active" and "passive" negligence and the correlative obligations of wrongdoers based upon such distinctions which antedated the statute, should not be applicable within the field covered by the statute, to an omission to obey the statutory command."

It clearly reiterated the foregoing in *Rufo* v. *Orlando*, 309 N. Y. 345, 350, stating:

> "As we have stated under the rulings in the *Walters* and *Semanchuck* cases, (*supra*), the Legislature had made inapplicable, for the purposes of the statute, the common-law rule of indemnity between passive and active tort-feasors. Thus any person violating the statute is per se an active tort-feasor, and hence such a person cannot have a cause of action in negligence against a joint tort-feasor. To hold otherwise would encourage a disregard for the objectives of the statute. The objectives of the statute are not alone to provide remedies for laborers but more particularly to prevent accidents causing the injuries. The sanctions imposed by the statute and cases are necessary to compel a high standard of case by forbidding any delegation of responsibility and any right of recovery over against even a joint tort-feasor. The exceptions to the rule do not apply here, as this Court specifically held in *Wischnie* v. *Dorsch* (296 N. Y. 257, 261)."

To the same effect as the *Semanchuck* and *Rufo* cases are the *Walters* and *Duncan* cases (*supra*) and *Bobbey* v. *Turner Const. Co.*, 308 N. Y. 890.

Although the New York Court of Appeals and Appellate Divisions have yet to pass upon the question of whether

a violation of Section 202 is active negligence *per se*, it would seem apparent that it must be, since, as previously indicated, wherever similar issues have arisen under either Section 202 or 241 they have been interpreted alike and their prime function is to set a high standard of care to prevent accidents.

The Court below however does not so intepret Section 202 and rests upon its decision in *Burris* v. *American Chicle Co.*, 120 F. (2d) 218, which was decided prior to the *Walters, Semanchuck, Duncan, Bobbey* and *Rufo* cases. In support of its position, the Court below cites only two cases which involve the imposition of liability upon a defendant under the provision of the New York State Labor Law.

In one, *McManus* v. *Board of Education of the City of Rochester*, 106 N. Y. S. (2d) 51, a Court sitting at Special Term merely followed the *Burris* case (*Cf., Chideckel* v. *Dime Savings Bank of Williamsburg*, 103 N. Y. S. (2d) 616; *McKay* v. *Pedigree Fabricks, Inc.*, 74 N. Y. S. (2d) 385; *Morris* v. *Attula*, 74 N. Y. S. (2d) 386).

The other *Wischnie* v. *Dorsch*, 296 N. Y. 257, interprets a section of the Labor Law (Sec. 316) which imposes a liability upon the owner of a tenant factory building whether he be in or out of possession, to respond in damages to anyone lawfully on the premises whether it be a workman or invitee (*Jolles* v. *3720 Corporation*, 163 Misc. 51), due to defects in certain portions of the premises. However this section is not akin to either Section 202 or 241. Not only does contributory negligence remain as a defense to actions predicated upon its provisions (*Hente* v. *Shercoop*, 289 N. Y. 140; *Dell'Olio* v. *Mastronardi*, 267 App. Div. 829) but its basic "legislative * * * design * * * was to insure the injured plaintiff an existing and responsible defendant" (*Wischnie* (*supra*), p. 262). Section 316 is thus similar to Section 59, New York State Vehicle and Traffic Law (negligence of

operator other than owner attributable to owner) in that the prime purpose of both is to have a financially responsible defendant, while the purpose of Sections 202 and 241 is primarily the prevention of accidents in hazardous industries by creating high standards of care.

This intent of the Legislature in enacting Sections 202 and 241 is made apparent by the fact that the classes of workers in the hazardous industries within their scope by definition fall within the protection of the New York Workmen's Compensation Law (§ 3, Groups 3 and 13).

If it is to be said that the Court below was in any way consistent in its opinion, such consistency may be found only in its continuously overlooking the prime purpose of Section 202, first by emasculating Rule 21 and then watering down the high standard of care imposed by that section.

The illogic of the Court below in differentiating between Sections 202 and 241 can be seen in its statement that conditions in the construction and demolition field are relatively static as compared to the implication therein that conditions in the window cleaning field are transitory. The very words construction and demolition connote rapid change and this connotation is repeatedly borne out by conditions actually existing at a construction (see, *e. g., Duncan* v. *Twin Leasing Corp.*, 283 App. Div. 1080) or demolition site (see, *e. g., Bobbey* v. *Turner*, 208 N. Y. 890).

It is the transitory nature of the work done by persons protected by Sections 202 and 241 which makes the active and affirmative duties of constant vigilance imposed by them reasonable. To this can be contrasted to the truly static conditions found in already existing buildings which may be leased out for a period of up to 99 years and the consequent passive duty imposed upon an owner as exemplified by Section 316 and *Wischnie* v. *Dorsch*, 296 N. Y. 257.

V

The opinion below is vague on the question of whether liability over in favor of TWA against Allied Maintenance was based upon the "indemnity" provisions of their contract or upon the common-law indemnity principles arising out of "passive" and "active" negligence previously discussed in Points III and IV.

With respect to the contract the trial Court charged:

> "That * * * Allied Maintenance Corporation obligated itself by its terms to indemnify * * * TWA from any negligence attributable to * * * Allied Maintenance, but not, of course, for any negligence attributable to * * * TWA *alone.*" (309) (Italics supplied.) This was excepted to (314).

In addition the trial Court refused to charge that the issue of whether TWA was entitled to indemnity under the contract was a question of law to be determined solely by the Court (278, 262).

It is a well settled rule of law in the State of New York that contracts will not be construed to indemnify a person against his own negligence unless such intention is expressed in unequivocal terms. *Thompson-Starrett Co.* v. *Otis Elevator Co.*, 271 N. Y. 36; *Dick* v. *Sunbright Steam Laundry Corp.*, 307 N. Y. 422; *Broderick* v. *Cauldwell-Wingate Co., Inc.*, 305 N. Y. 872; *Walters* v. *Rao* (*supra*); *Semanchuck* v. *Fifth Avenue* (*supra*); *Bobbey* v. *Turner* (*supra*); *Miller* v. *Pennsylvania Railroad Co.*, 236 F. 2d 295.

That the trial Court erred in failing to dismiss the cause of action for contractual indemnity as a matter of law is made apparent by the cited cases in which similar or stronger contracts have been held to be lacking in the necessary unequivocal intent to indemnify a defendant for his own negligence, which negligence is the basis for his liability to plaintiff in the first instance.

VI

In any event the issues in the impleader actions require a new trial. The Court below correctly stated that any recovery by plaintiff on the first cause of action (*i. e.*, the creation of a sudden blast of air without warning) would be a determination of TWA's "active" negligence thereby doing away with any possible right to indemnity.

Since there would have been a reversal of the verdict and judgment against plaintiff on the first cause of action for error, it must of necessity follow that the question of whether TWA was "actively" or "passively" negligent was not properly or finally determined as between it and the impleaded defendants. For if the first cause of action were properly submitted to the jury they might have found against TWA under it and there would as a matter of law have been no possible right to indemnity. Therefore, at least as to TWA and the impleaded defendants there must be a new trial. *Banks* v. *Central Hudson Gas & Electric Corp.*, 224 F. 2d 631, cert. den. *Central Hudson Gas & Elec. Corp.* v. *Banks*, 350 U. S. 904.

Although plaintiff is content with an affirmance of his judgment no matter on which ground it is based, it is unconscionable to let the affirmance of the entire judgment stand. This is another instance of the Circuit Court's complete disregard of the rights of the impleaded defendants and its unconcern about them. The axiom that "justice is blind" refers to its impartiality. In the case at bar it would seem that such statement can be taken literally for it appears that as the Circuit Court read down the caption of this case its insight into injustices dimmed further and further until it could or would see none when it reached the fourth-party defendant.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Bruce A. Pettijohn, Jr.,
Counsel for Petitioner.

Appendix "A"

CLARK, *Chief Judge*:

These are appeals by all four parties to an action by plaintiff Kozman for damages for personal injuries resulting from his fall from a ladder while engaged in cleaning the windows of a door of a TWA hangar located at La-Guardia Airport in New York City. Originally Kozman, a window cleaner employed by Allied Cleaning Contractors, Inc., commenced an action in the Supreme Court of New York against TWA, which maintained, managed, operated, and controlled the hangar in question pursuant to a lease, originally from the owner of the airport, the City of New York, later assigned to the Port of New York Authority. Kozman alleged that TWA negligently, suddenly, and without warning revved up all four engines of one of its airplanes with such force as to cause the air current and sound blast engendered by this action "suddenly and violently [to] blow, push and propel the plaintiff and the top of the ladder on which plaintiff was standing to one side and thereafter [to] cause the top of the ladder to slip away from the point at which it rested against the said door and thereafter to dislodge the plaintiff and cause him to be hurled suddenly and violently to the ground below."

After removal of the action to the United States District Court because of the diverse citizenship of the parties, TWA moved to implead Allied Maintenance Corporation, its window cleaning contractor, as a third-party defendant on the basis of the indemnity provisions of the contract between these two parties.[1] TWA alleged that Allied Main-

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[1] "It is understood that we [Allied Maintenance Corp.] will be allowed the use of your telescope scaffold which is located on these premises, which we agree to use at our own risk.

"We will supply all necessary supplies, labor and equipment necessary to perform this service in a thorough and workmanlike manner.

(*Footnote continued on following page*)

tenance had violated N. Y. Labor Law § 202 by allowing Kozman to use an ordinary window cleaner's ladder to do his work, instead of making him use a telescoping scaffold which TWA had supplied and provided in accordance with the contract.

Thereafter Kozman served an amended complaint in which he repeated the allegations of his original complaint for common law negligence and added a second "cause of action" wherein he repeated his first "cause of action" and further alleged that TWA had violated §§ 28, 29, 30, 202, and 240 of the N. Y. Labor Law, and the Rules of the Board of Standards and Appeals promulgated pursuant to those sections, by failing to provide him with any safety device of any kind or nature within the purview of those sections. TWA denied the material allegations of Kozman's complaint and served an amended third-party complaint which was identical with its original third-party complaint. Allied Maintenance, in addition to denying the material allegations of both Kozman's and TWA's amended complaints, served a fourth-party complaint upon Allied Cleaning seeking indemnity and alleging that Allied Maintenance sublet the window cleaning contract to Allied Cleaning, for which plaintiff was working.

After trial before Judge Noonan and a jury both "causes of action" were submitted for consideration of the jury, which returned a verdict for TWA on the first "cause of action," and for Kozman on the second. In turn the jury granted recovery over by TWA against Allied Maintenance,

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(*Footnote continued from preceding page*)

* * *

"We agree to indemnify and hold you harmless from and against any and all claims, demands, charges, liabilities or damage by reason of claims for injury to, or death of persons and loss of or damage to property caused by or arising from the negligence of ourselves, our agents, servants or employees during the course of the performance of this agreement."

and by Allied Maintenance against Allied Cleaning—all in the amount of $17,000 and costs. This appeal from the resulting judgment followed.

The Facts

At 10:30-11:00 a. m. on December 15, 1950, Kozman, an experienced professional window cleaner, was cleaning the lower window panes of TWA's hangar door. He was standing about 10 feet up on an ordinary three-section window cleaner's ladder having an over-all extended length of about 18 feet. The ladder was not equipped with rubber "boots" or "shoes" on its lower extremities. Nor were the windows equipped with anchors to which might be attached safety belts for the cleaners, though the use of such safety devices appears not to have been practicable here.

Adjacent to the hangar doors and running the entire length of the hangar was a strip of level concrete or hard surfacing 4 to 5 feet wide, beyond which the surface began to slant downward to some extent. Prior to mounting the ladder Kozman had placed its feet on the concrete strip about 3 to 3½ feet away from the hangar doors. No one was holding the ladder on the day of the accident, although Kozman testified that it was customary to have a co-worker hold the bottom of the ladder if conditions were such that it might slip. The day before, when he was working on an extension ladder 40 to 44 feet in length, he had had another worker holding the bottom of the ladder.

A Weather Bureau Report introduced into evidence showed that some snow had been falling during the 2½ hours preceding the accident. At 10:40 a. m. ocasional snowflakes were falling, possibly accompanied by light rain.

The day before the accident there was testimony that TWA employees had moved aircraft in and out of its hangars by jeep and had warmed up engines near the

hangars, but had not created too much "power to the wind." Kozman could observe and feel the extent and strength of the draft thus created by the manner in which it blew against the hangar doors and by the "shaking and rattling" of the doors. There was some evidence that on the preceding day and on other occasions TWA employees warned the window cleaners when aircraft were to be warmed up in the vicinity, but most of this proffered evidence of a prior custom of warning was excluded by the trial judge.

The accident occurred while Kozman was cleaning a window with his right hand and was holding the side of the ladder with his left. His pail of water was suspended from a rung of the ladder. He testified that suddenly and without warning to him "* * * a big noise came out from the four motors of the TWA airplane, and all of a sudden a great wind like a hurricane hit me, and the doors was shaking and rattling. The top of the ladder blew off on the right side glass and kept on bouncing down. I grabbed my hands around the ladder and down I went." And a TWA maintenance foreman testified that at about the time of the fall all four engines of a TWA aircraft were being warmed up near the hangars prior to its departure for the marine terminal.

The evidence is clear that the top of the ladder slipped. Whether the bottom also slipped is not at all clear, although at one point Kozman testified categorically that the bottom did not slip. Still the sequence of questions and answers in which this denial appears, read as a whole, seems to leave the issue still in doubt; and at any rate Kozman, who was standing well up on the ladder, could hardly have known what happened to its feet.

Appendix "A"

The First "Cause of Action"

Although a new trial is not necessary in view of the plaintiff's ultimate recovery, we think the trial court erred in two regards with respect to the first "cause of action" against TWA for suddenly and negligently reviving up its engines. First it was error to exclude evidence of a custom or habit on the part of TWA's employees to warn the window washers at the hangar of the proposed operation. This evidence was not offered to show a habit or custom of negligence, but to show a custom of care, the breach of which on the day of the accident constituted negligence. See *Mahoney* v. *New York Central R.R.*, 2 Cir., June 29, 1956; *Renaldi* v. *New York, New Haven & Hartford R. Co.*, 2 Cir., 230 F. 2d 841; *Cereste* v. *New York, New Haven & Hartford R. Co.*, 2 Cir., 231 F. 2d 50, certiorari denied *New York, New Haven & Hartford R. Co.* v. *Cereste*, 76 S. Ct. 848; *Eaton* v. *Bass*, 6 Cir., 214 F. 2d 896. Thus it was admissible as relevant to the standard of care which a reasonable and prudent man would exercise under the circumstances. In addition it was clearly relevant to show absence of contributory negligence and probably of assumption of risk, since plaintiff's own standard of care would be affected by reasonable reliance on a customary warning by defendant. See also *Davis* v. *Central Vermont Ry.*, 2 Cir., 227 F. 2d 948.

Further, the charge on assumption of the risk was erroneous and prejudicial. The court charged in part as follows:

> "Should you find that the job then being done contained certain hazards of which the plaintiff knew or should have known in the exercise of reasonable care when he undertook to do the job, and that he nevertheless assumed the risk of those hazards and was

thereby injured, then you should find for the defendant TWA against the plaintiff on the latter's cause of action.

"If, however, you should find that the plaintiff was not himself negligent and did not assume the risk of what befell him and at the same time you find that the defendant TWA was in fact negligent and that this negligence was the proximate cause of the plaintiff's injuries, then you should return a verdict in favor of the plaintiff and against the defendant TWA."

This general and somewhat sweeping language was not justified by the circumstances of this case. In the leading New York case of *Zurich General Accident & Liability Ins. Co.* v. *Childs Co.*, 253 N. Y. 324, 327, 328, 171 N. E. 391, where, as here, *plaintiff was not an employee of the alleged tort-feasor,* Chief Judge Cardozo made a comprehensive statement of the law of assumption of risk, during the course of which he said: "The question, therefore, is whether [plaintiff], leaping on the elevator, was so informed of the dangers inhering in the leap as to be placed in the position of one willing to encounter them."

The evidence here (which would have been substantially buttressed by the erroneously-excluded testimony of the custom to warn) was to the effect that Kozman was not informed of the warming up of the TWA plane. If on the basis of past experience he could expect to be warned, he can hardly be held to have assumed the risk of a sudden and unexpected warm-up. Whatever charge on assumption of risk is appropriate here must be clearly limited by the principles of the *Zurich* case, *supra,* and by reference to the admissible evidence on past custom of warning. See *Povanda* v. *Powers,* 152 Misc. 75, 272 N.Y.S. 619. But as noted below, our affirmance of plaintiff's judgment requires no further or separate action on this issue.

Appendix "A"

The Second "Cause of Action"

The jury found for Kozman against TWA on the basis of TWA's alleged violation of N. Y. Labor Law § 202[2] and

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[2] Sec. 202 of N. Y. Labor Law (30 McKin. Consol. Laws of N. Y., § 202), commonly called the "Window Cleaner's Code," on December 15, 1950, read as follows:

"§ 202. *Protection of persons engaged at window cleaning*

"The owner, lessee, agent and manager of every public building where the windows are cleaned from the outside shall install and maintain anchors on all windows of such building or provide other safe means for the cleaning of the windows of such building as may be required and approved by the board of standards and appeals. The owner, lessee, agent, manager or superintendent of any such public building shall not require, permit, suffer or allow any window in such building to be cleaned unless such anchors or other means are provided to enable such work to be done in a safe manner in conformity with the requirements of this chapter and the rules of the board of standards and appeals. A person engaged at cleaning windows of a public building shall use the safety devices provided for his protection. Every employer or contractor shall require his employees while engaged in cleaning any window of a public building, to use the equipment and safety devices required by this chapter and rules of the board of standards and appeals.

"The provisions of this section shall not apply to (1) multiple dwellings six stories or less in height located anywhere in this state; nor to (2) any building three stories or less in height in cities, towns or villages having a population of less than forty thousand; nor to (3) the window or windows of any building which may be exempted under any rule adopted by the board of standards and appeals.

"The board of standards and appeals may grant variations pursuant to the provisions of section thirty of this chapter exempting the windows of any building from the provisions of this section where such windows can be and are to be cleaned from the inside.

"The board of standards and appeals may make rules supplemental to this section by designating safety devices of an approved type and strength to be installed on public buildings or to be worn by window cleaners or both, but the absence of any such rule shall not relieve any person from the responsibility placed on him by this section."

Appendix "A"

Industrial Code Rule 21[3] promulgated thereunder by the Board of Standards and Appeals, and further found liability over against Allied Maintenance and Allied Cleaning respectively. The two latter defendants argue that, since the accident happened upon premises owned or leased by the Port of New York Authority, the N. Y. Labor Law has no application. But this case does not

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[3] Industrial Code Rule 21 implements § 202 by designating the types of safety devices approved by it. In defining the scope and application of Code Rule 21, the Board stated in Rule 21-2.2.6: "Every window the lowest part of the frame of which is six feet or more above ground shall be provided with anchors and shall be cleaned by means of such anchors and safety belts except where other safe means are permitted by these rules."

The types of "approved" safety devices (other than anchors) then enumerated in Code Rule 21 were as follows:

I. "21-6. *Ladders*

"21-6.1. *When to be used.* Ladders shall be used for window cleaning operations only where the windows cannot otherwise be cleaned safely and practically by means of anchors and safety belts.

"21-6.2. *General use requirements.*

"21-6.2.1. Means of preventing slipping. All ladders used in connection with cleaning operations shall be provided with suitable means to prevent slipping.

"21-6.2.2. Person to hold ladder. Ladders more than 18 feet in length used on a public street, and elsewhere more than 24 feet in length, used in connection with window cleaning operations, shall have a person stationed at all times at the foot of the ladder to hold it in place while the window cleaner is on the ladder. Such person shall face the ladder and hold it with both hands."

II. "21-7. *Swinging and built up scaffolds.*

"21-7.1. *When to be used.* Scaffolds shall be used for window cleaning operations only where the windows of a public building cannot otherwise be cleaned safely and practicably by means of anchors and safety belts." (The succeeding provisions of Code Rule 21 [Rule 21-7.2.1 through 21-7.3.2] define the construction and specifications of "swinging scaffolds"; 21-7.4 deals with "Built up light duty scaffolds," their types and specifications.)

III. "21-8. *Boatswains chairs.*"

involve an attempt directly or indirectly to regulate the Port of New York Authority. Cf. *Port of New York Authority* v. *J. E. Linde Paper Co.*, 205 Misc. 110, 127 N. Y. S. 2d 155; *Port of New York Authority* v. *Weehawken Tp.*, 27 N. J. Supp. 328, 99 A. 2d 377; *Rao* v. *Port of New York Authority*, 2 Cir., 222 F. 2d 362, affirming D. C. E. D. N. Y., 122 F. Supp. 595. Rather the question here is whether the states of New York and New Jersey in creating the Port Authority intended that, as between third persons, none of whom can contend it was duly authorized by the Port Authority to employ another standard, a civil remedy otherwise available for violating a statutory standard would be lost solely because the operative facts transpired at a Port Authority airport.[4] In *James Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 127 A. L. R. 821, the Supreme Court, affirming the decision of the New York courts, held that an employee of a building contractor engaged in the construction of a post office building on United States property might recover in tort from the contractor for injuries attributable to the contractor's failure to observe the standards set forth in a provision of the N. Y. Labor Law. Although the legal relationship of the State of New York to the property where the injury occurred in the *James Stewart & Co.* case differed in some particulars from that existing here, we think the considerations of policy and reasoning there to be closely applicable here and the same result clearly indicated. It may be noted that the Port of New York Authority, in its brief submitted *amicus curiae* in this case, supports this conclusion.

A more difficult problem is the question whether plaintiff adduced sufficient evidence to support his favorable verdict

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[4] The statutes establishing the Port Authority's control of its air terminals are N. Y. Laws 1947, Ch. 802, § 10; N. J. Laws 1947, Ch. 43, § 10. These, however, contain nothing indicating an intent to deprive Kozman of his rights herein asserted under the N. Y. Labor Law.

based on the alleged violation of N. Y. Labor Law § 202. TWA's liability under this statute is predicated upon its failure to require that adequate equipment be provided to Kozman to permit him to clean the windows safely under the existing circumstances. The only equipment furnished to Kozman was a ladder without shoes. It is argued that, since under the regulation promulgated pursuant to the statute a ladder was proper equipment, there was no violation of the statute.

Allied Maintenance and Allied Cleaning contend that there was no evidence that the ladder slipped at the bottom, and hence that the absence of shoes was unimportant. We may assume, *arguendo,* that the ladder did not slip at the bottom (thereby making irrelevant the absence of shoes), although, as pointed out above in the statement of the facts, the evidence on this point taken in context was not conclusive. Still, although the ladder may not have been defective, it did fall when exposed to the force of the propeller wash. The jury could have found that the ladder, although in good condition, was inadequate, in the circumstances here present, to provide a safe method for the cleaning of the hangar windows.

The mere fact that the use of a ladder was approved by the regulations should not be taken to establish that, in peculiar circumstances tending to make the use of a ladder unsafe to clean the windows, the party responsible for the employees' safety will be absolved from all liability simply because it is utilized. In *Pollard* v. *Trivia Building Corp.*, 291 N. Y. 19, 23-24, 50 N. E. 2d 287, the New York Court of Appeals said: "* * * nor does the fact that the Industrial Code specifies a particular device exclude other devices that might in a particular case be reasonably deemed better adapted for the protection of the window cleaner." Moreover, § 202 provides: "The board of standards and appeals may make rules supplemental to this section by designating safety devices of an approved type

and strength to be installed on public buildings or to be worn by window cleaners or both, but the absence of any rule shall not relieve any person from the responsibility placed on him by this section." To construe the statute narrowly to allow the use of a ladder in circumstances where its use would be dangerous would be contrary to the New York cases which say that the statute should be liberally construed to protect the workers. See *Koenig* v. *Patrick Const. Corp.*, 298 N. Y. 313, 319, 83 N. E. 2d 133; *Red Hook Cold Storage Co.* v. *Dept. of Labor*, 295 N. Y. 1, 64 N. E. 2d 265; *Osborne* v. *Salvation Army*, 2 Cir., 107 F. 2d 929.

Some of the defendants argue that, since there were men on hand whom Kozman could have called to hold the ladder, safe and adequate equipment was provided for the job. But Kozman had no warning of the sudden gust of air, and he presumably believed that he did not need anyone to hold the ladder while there was no wind and he was only 10 feet from the ground. It is true that on the previous day he and others had held the ladders for men who were washing windows. But the ladders used on that day were "extension" ladders, and the work done was higher up. Also, there had then been warnings before the engines were started, so that there would have been time to call men to hold the ladders and prevent their being blown over.

Since, therefore, there was sufficient evidence for the jury to find that TWA had failed in its duty to see that adequate equipment was provided to Kozman to enable him to do his job safely, it would have been error to remove the claim based on TWA's statutory default from the jury's consideration. The jury's determination of this claim must therefore stand. See *Swafford* v. *Atlantic Coast Line R. Co.*, 350 U. S. 807.

The jury further found for TWA against Allied Maintenance and for the latter against Allied Cleaning. TWA

can recover over against Allied Maintenance and the latter over against Allied Cleaning only if Kozman succeeds on his second "cause of action" arising from the alleged violation of the N. Y. Labor Law. For his first "cause" based on TWA's negligence in creating a blast of air without warning was certainly "active," thus barring indemnity over under the authorities. See *Thomas-Starrett Co.* v. *Otis Elevator Co.*, 271 N. Y. 36, 41, 2 N. E. 2d 35; *McFall* v. *Compagnie Maritime Belge* (*Lloyd Royal*) S.A., 304 N. Y. 314, 328-329, 107 N. E. 2d 463.

Allied Maintenance and Allied Cleaning argue that there can be no recovery over against them even on the claim based on the N. Y. Labor Law. In part they contend that there is no competent evidence establishing that the ladder slipped, and hence the sole cause of the accident was the gust of wind from the plane engines. But whether the ladder slipped at the bottom or was blown over at the top, the jury was justified in finding that inadequate provision was made to prevent the ladder from falling or that a ladder was inadequate to do the job under these circumstances. If TWA was thus guilty of failure to conform to the standards set by the N. Y. Labor Law, the jury might reasonably find, as it did, that it was entitled to indemnity from Allied Maintenance and Allied Maintenance from Allied Cleaning by an appropriate determination of the seven issues among these three defendants as carefully framed by the trial judge. True, as a question of law the problem presented is whether TWA by its default under the Labor Law was "actively" negligent and, therefore, not entitled to indemnity. But the mere fact that TWA violated the Law is insufficient to render it guilty of "active" negligence. *Burris* v. *American Chicle Co.*, 2 Cir., 120 F. 2d 218, 222.

Allied Maintenance and Allied Cleaning argue that the *Burris* case, *supra,* is no longer controlling and that sub-

sequent decisions of the New York Court of Appeals, although not directly in point, show a strong tendency to deny recovery over in cases involving analogous violations of the N. Y. Labor Law. Specifically, our attention is directed to cases arising under § 241 of the N. Y. Labor Law dealing with the safeguarding of persons engaged in building construction and demolition work. See *Walters* v. *Rao Electrical Equipment Co.*, 289 N. Y. 57, 43 N. E. 2d 810, 143 A. L. R. 308; *Semanchuck* v. *Fifth Ave. & 37th St. Corp.*, 290 N. Y. 412, 49 N. E. 2d 507; *Duncan* v. *Twin Leasing Corp.*, 283 App. Div. 1080, 131 N. Y. S. 2d 423, leave to appeal denied 307 N. Y. 940, 122 N. E. 2d 336. But the *Semanchuck* and similar cases involving that statute merely hold that the section imposes a "positive" duty upon the owner and contractor alike and that it is an active, primary duty, the existence of which precluded indemnity in the cases cited. This is not unreasonable, considering the relatively static construction conditions covered by that section, for which an owner or general contractor might be expected to assume active responsibility. But the same considerations do not apply to the respective responsibilities imposed by § 202 on a lessee and his contractor for window cleaning.

The New York courts have clearly and explicitly limited the principle of indemnity thus stated to cases arising under § 241. *Wischnie* v. *Dorsch*, 296 N. Y. 257, 72 N. E. 2d 700; *Schwartz* v. *Merola Bros. Const. Corp.*, 290 N. Y. 145, 48 N. E. 2d 299; *McFall* v. *Compagnie Maritime Belge (Lloyd Royal) S.A., supra*, 304 N. Y. 314, 107 N. E. 2d 463; *Meltzer* v. *Temple Estates*, 203 Misc. 602, 116 N. Y. S. 2d 546; *McManus* v. *Board of Ed. of City of Rochester*, Sup., 106 N. Y. S. 2d 51; *Sid* v. *Stokes Associates, Inc.*, Sup., 145 N. Y. S. 2d 368; *Lobello* v. *City of New York*, 268 App. Div. 880, 51 N. Y. S. 2d 7, appeal denied 268 App. Div. 999, 52 N. Y. S. 2d 790, affirmed 294 N. Y. 816, 62 N. E. 2d

243; *Lundberg* v. *Prudential S. S. Corp.*, D. C. S. D. N. Y., 102 F. Supp. 115. Hence we think the authority of *Burris* v. *American Chicle Co., supra,* 2 Cir., 120 F. 2d 218, is unimpaired and controlling here, and permits recovery over against the window cleaning contractors. See also *Banks* v. *Central Hudson Gas & Elec. Corp.*, 2 Cir., 224 F. 2d 631, certiorari denied *Central Hudson Gas & Elec. Corp.* v. *Banks,* 350 U. S. 904.

Rulings on Evidence

Allied Maintenance and Allied Cleaning object to the admission in evidence of certain notes and reports to the Workmen's Compensation Board of the physicians who treated Kozman. This evidence, which was based on Kozman's statements to the physicians, was to the effect that the ladder slipped; and there was no mention of its being blown over by strong gusts of wind.[5] TWA offered this evidence to rebut Kozman's claim that his fall resulted from a sudden blast of propeller wash. Kozman himself obtained the admission in evidence of a letter dated March 5, 1951, from the Deputy Medical Superintendent of Queens General Hospital to one of the physicians, which states in part: "The above named individual [Kozman] was admitted to this hospital 12/15/50 with history of having fallen from a ladder while at work." Both physicians whose notes and reports were introduced were witnesses at the trial and subject to cross-examination concerning Kozman's account of his version of the accident.

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[5] See typically the report of Dr. Wahl: *"History:* While cleaning windows at LaGuardia Airport, the patient slipped with the ladder, and fell down on both arms. He was unconscious, and was taken to Queens General Hospital by ambulance." And the report of Dr. Benedig: "While cleaning windows, the ladder slipped and I fell with the ladder and broke my both arms, nose, jawbone, and a number of my teeth."

Allied Maintenance and Allied Cleaning concede that, while these notes, reports, and records may be admissible as between Kozman and TWA on the issue as to the existence of a "gust of wind," they were improperly used against the two impleaded defendants on the Labor Law claim to show that the ladder slipped. Specifically they suggest "that the Trial Court's acceptance into evidence of the history in the hospital record and the notes and reports of the physicians were the basis of his subsequently charging the jury that it could find that the ladder slipped without limiting such charge to the main action alone."

But as we have pointed out above, neither TWA's nor the impleaded defendant's liability on the Labor Law claim turns exclusively on the question whether the ladder slipped at the bottom. Further, the issues between TWA and the impleaded defendants as formulated by the judge in his charge make no mention of the slipping of the ladder. In any event, it is clear that the medical reports and records, in so far as they bear upon the account of the happening of the accident, were of importance only upon the issue of TWA's negligence in warming up the engines. Whatever implication they may have for the question whether the ladder in fact slipped at the bottom is obscure and too trivial to be prejudicial to the impleaded defendants. Hence we need not consider the applicability of the Federal Business Records Act, 28 U. S. C. § 1732, and the distinction as drawn in, *e.g.*, McCormick on Evidence 611 (1954) between use of the doctors' records as case history relevant to diagnosis and treatment and their use—against someone other than the patient—as evidence of the truth of the facts stated. Compare *Terrasi* v. *South Atlantic Lines*, 2 Cir., 226 F. 2d 823, certiorari denied 350 U. S. 988, and cases cited.

Appendix "A"

CONCLUSION

Since we affirm Kozman's recovery and TWA's and Allied Maintenance's recovery over of indemnity on the claim of violation of the Labor Law, plaintiff is not entitled to a new trial on his additional theory of common law negligence. Though attempts to recover on the two theories be denominated two different "causes of action," they each involve the same accident, the same injuries, and the same damages, and are in effect merely two bases for the same claim. Since he is actually recovering his damages on this claim, he is not injured by any failure to adopt his legal views in full detail. Nor in fact does he ask for a new trial in the event of our affirmance of the verdict and judgment awarded him.

Affirmed.

HINCKS, *Circuit Judge* (dissenting in part):

I agree with the holdings of the majority of the court as to error inherent in the verdict for the defendant TWA on the First Cause of Action. I think, however, that there was no evidence to support the plaintiff's verdict on the Second Cause of Action.

This second count was based solely on an alleged breach of statutory duty imposed by N. Y. Labor Law § 202 which is implemented by Industrial Code Rule 21. Since concededly it was not feasible to install anchors on the hangar doors, under § 202 it was TWA's duty to "provide other safe means for the cleaning of the windows * * * as may be required and approved by the Board of Standards and Appeals."

In addition to anchors and safety-belts, the "other safe means * * * required and approved" were (1) Ladders

equipped with "suitable means to prevent slipping," with a helper to hold in place "ladders more than 18 feet in length on a public street, and elsewhere more than 24 feet in length" (Rule 21-6.1 and 6.2); (2) Scaffold (Rule 21-7); and (3) Boatswains chairs (Rule 21-8). Plainly the statute, § 202, does not require that where, as here, anchors are concededly impracticable, the owner must for each window provide all three "safe means": the provision of one of the three approved means complies with the statute. *Teller* v. *Prospect Heights Hospital,* 280 N. Y. 456, 21 N. E. 2d 504.

The ladder involved in this case was not over 18 feet and was not being used on a public street. Thus no helper to hold it in place was required by Rule 21-6.2. Even if—as there was some evidence to show—the ladder was not equipped with rubber "boots" to prevent slipping, that fact could not possibly have been the proximate cause of the accident. The plaintiff's own testimony required a finding to the contrary. On the trial he testified as follows: Q. "Did the ladder slip from the bottom? Did the feet slip?" A. "It slipped to the right side. I was blown off." Q. "My question was, sir, did the feet of the ladder slip?" A. "No." It follows that there was no basis for a plaintiff's verdict on the second count.

My brothers quote *Pollard* v. *Trivia Building Corp.,* 219 N. Y. 19, 50 N. E. 2d 287, for its statement that "the fact that the Industrial Code specifies a particular device [does not] exclude other devices that might in a particular case be reasonably deemed better adapted for the protection of the window cleaner." I confess that I do not understand just what was meant by the statement or why it was included in an opinion in a case in which concededly no safety device whatever had been provided. But it is abundantly clear, especially in the light of *Teller* v. *Prospect Hospital, supra,* cited thereto, that the passage does *not* mean that an owner who provides a safe means approved

by the Code may nonetheless be held to have violated the Statute.

Nor can I understand the relevance of the final paragraph of § 202 of the Labor Law which my brothers say "should be liberally construed to protect the workers." To me it seems wholly obvious that by that paragraph it was meant only that an owner should not be absolved from providing a safe means sanctioned by the Code merely because another means, which he may have provided and which may have been adequate to satisfy the objective of the Statute, was not included as an approved means in the Code. My brothers seem to think their holding permissible under a *liberal construction* of the statute. I think they can reach their result only by arrogating to themselves, or according to the jury, power to add some Rule to the Code. And even so, they give no definition whatever to the synthetic Rule which they seem to envisage. Certainly the cases which they cite do not justify statutory construction of such vague and sweeping amplitude.

I would reverse the judgment for the plaintiff on the second count and the judgments on the third- and fourth-party complaints (which are dependent on the plaintiff's second count) and remand with a direction to dismiss. On the first count, I would reverse for the errors noted in the majority opinion and remand for new trial.

Appendix "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Before CLARK, Chief Judge, and FRANK and HINCKS, Circuit Judges.

On Petition for Rehearing of Allied Cleaning Contractors, Inc.

Raymond C. Green, New York City (Bernard Katzen, New York City, on the brief), for Allied Cleaning Contractors, Inc., fourth-party defendant-appellant.

PER CURIAM.

Petition for rehearing denied.

C.E.C.

J.N.F.
U.S.C.J.J.

I dissent.

C.C.H.
U.S.C.J.

Filed: August 27, 1956

Appendix "B"

Federal Business Records Act, 28 U.S.C. § 1732

§ 1732. Record made in regular course of business; photographic copies

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any

judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence. As amended Aug. 28, 1951, c. 351, §§ 1, 3, 65 Stat. 206.

N. Y. Labor Law, § 202, as it read on December 15, 1950

§ 202. Protection of persons engaged at window cleaning.

The owner, lessee, agent and manager of every public building where the windows are cleaned from the outside shall install and maintain anchors on all windows of such building or provide other safe means for the cleaning of the windows of such building as may be required and approved by the board of standards and appeals. The owner, lessee, agent, manager or superintendent of any such public building shall not require, permit, suffer or allow any window in such building to be cleaned unless such anchors or other means are provided to enable such work to be done in a safe manner in conformity with the requirements of this chapter and the rules of the board of standards and appeals. A person engaged at cleaning windows of a public building shall use the safety devices provided for his protection. Every employer or contractor shall require his employee, while engaged in cleaning any window of a public building, to use the equipment and safety devices required by this chapter and rules of the board of standards and appeals.

Appendix "B"

The provisions of this section shall not apply to (1) multiple dwellings six stories or less in height located anywhere in this state; nor to (2) any building three stories or less in height in cities, towns or villages having a population of less than forty thousand; nor to (3) the window or windows of any building which may be exempted under any rule adopted by the board of standards and appeals.

The board of standards and appeals may grant variations pursuant to the provisions of section thirty of this chapter exempting the windows of any building from the provisions of this section where such windows can be and are to be cleaned from the inside.

The board of standards and appeals may make rules supplemental to this section by designating safety devices of an approved type and strength to be installed on public buildings or to be worn by window cleaners or both, but the absence of any such rule shall not relieve any person from the responsibility placed on him by this section. Added L. 1942, c. 824; amended L. 1943, c. 495; L. 1946, c. 603, eff. April 8, 1946.

Appendix "C"

RULES
AS AMENDED RELATING TO
PROTECTION OF PERSONS EMPLOYED
AT
WINDOW CLEANING

These Rules effective April 1, 1944, were adopted by the Board of Standards and Appeals of the Department of Labor, March 15, 1944, in accordance with the provisions of Section 202 of the Labor Law. These Rules supersede the existing Industrial Code Bulletin No. 21 adopted by the Industrial Board, effective April 1, 1933.

STATE OF NEW YORK
BOARD OF STANDARDS AND APPEALS } *ss.:*

I, WILLIAM H. ROBERTS, CHAIRMAN OF THE BOARD OF STANDARDS AND APPEALS of the New York State Department of Labor, DO HEREBY CERTIFY, that a copy of the Board's resolution dated March 15, 1944, adopting Industrial Code Rule No. 21, Relating to Protection of Persons Employed at Window Cleaning, effective as of April 1, 1944, and rescinding existing Industrial Code Bulletin No. 21, and certified copy of said rule as adopted, were formally filed with the Department of State of the State of New York on March 18, 1944, in accordance with the provisions of Section twenty-nine of the Labor Law and of Article IV, Section 8, of the Constitution of the State of New York.

WILLIAM H. ROBERTS,
Chairman, Board of Standards and Appeals

Dated at Albany, N. Y., this 18th day of March, 1944.

EXTRACT OF THE LABOR LAW

Authorizing the Promulgation of the Rules Herein Contained

Section 202.

The owner, lessee, agent and manager of every public building where the windows are cleaned from the outside shall install and maintain anchors on all windows of such building or provide other safe means for the cleaning of

the windows of such building as may be required and approved by the board of standards and appeals. The owner, lessee, agent, manager or superintendent of any such public building shall not require, permit, suffer or allow any window in such building to be cleaned unless such anchors or other means are provided to enable such work to be done in a safe manner in conformity with the requirements of this chapter and the rules of the board of standards and appeals. A person engaged at cleaning windows of a public building shall use the safety devices provided for his protection. Every employer or contractor shall require his employee, while engaged in cleaning any window of a public building, to use the equipment and safety devices required by this chapter and the rules of the board of standards and appeals.

The provisions of this section shall not apply to (1) multiple dwellings six stories or less in height located anywhere in this state; nor to (2) any building three stories or less in height in cities, towns or villages having a population of less than forty thousand; nor to (3) the window or windows of any building which may be exempted under any rule adopted by the board of standards and appeals.

The board of standards and appeals may grant variations pursuant to the provisions of section thirty of this chapter exempting the windows of any building from the provisions of this section where such windows can be and are to be cleaned from the inside.

The board of standards and appeals may make rules supplemental to this section by designating safety devices of an approved type and strength to be installed on public buildings or to be worn by window cleaners or both, but the absence of any such rule shall not relieve any person from the responsibility placed on him by this section.

Section 30.

* * * * *

Appendix "C"

EXTRACT OF THE PENAL LAW

Section 1275. Violations of labor law; the industrial code; the rules, regulations or orders of the department of labor, the industrial commissioner and *industrial board.

Any person who violates or does not comply with any provision of the labor law, any provision of the industrial code, any rule, regulation or lawful order of the department of labor, industrial commissioner or *industrial board, and any person who knowingly makes a false statement in or in relation to any application made for an employment certificate as to any matter required by the labor law to appear in any affidavit, record, transcript or certificate therein provided for, is guilty of a misdemeanor and upon conviction shall be punished, except as in this chapter or in the labor law otherwise provided, for a first offense by a fine or not more than fifty dollars; for a second offense by a fine or not less than fifty nor more than two hundred and fifty dollars, or by imprisonment for not more than thirty days or by both such fine and imprisonment; for a third offense by a fine of not less than two hundred and fifty dollars, or by imprisonment for not more than sixty days, or by both such fine and imprisonment.

Industrial Code Rule No. 21—Protection of Persons Engaged in Window Cleaning

RULES *promulgated by the Board of Standards and Appeals pursuant to sections 2 subd. 13, 27-a, 28, 29, 200 and 202 of the Labor Law:*

21—1. Definitions.

21—1.1. "Anchor" means the fitting fastened to the window frame or wall to which the safety belt terminal is attached.

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*Chapter 819, Laws of 1937, transferred powers and duties under the Labor Law to the board of standards and appeals.

21—1.2. "Approved" means approved by the Board of Standards and Appeals.

21—1.3. "Board" means the Board of Standards and Appeals of the New York State Department of Labor.

21—1.4. "Commissioner" means the Industrial Commissioner of the state of New York, or his duly authorized representative.

21—1.5. "Factory building" is such a building as defined in section 2, subdivision 10, of the Labor Law.

21—1.6. "Mercantile building" is one occupied by a mercantile establishment as defined by section 2, subdivision 11, of the Labor Law.

21—1.7. "Multiple dwelling" means a building which is either rented, leased, let or hired out, to be occupied or is occupied as the abode, residence or home of three or more families living independently of each other. Such a building which, because of its occupancy, conforms with the definition of mercantile establishment or factory building as defined in the Labor Law, shall not be deemed to be a multiple dwelling.

21—1.8. "Public building" means such a building as is defined by subdivision 13 of section 2 of the Labor Law.

21—2. Application and scope.

21—2.1. Application and short title. These rules shall apply to all window cleaning operations performed on all public buildings and multiple dwellings except as otherwise provided herein.

These rules shall be known and may be cited as "The window cleaning code."

Appendix "C"

21—2.2. *Exemptions.*

21—2.2.1. Multiple dwellings. These rules shall not apply to multiple dwellings six stories or less in height located anywhere in this State.

21—2.2.2. Three story building in small cities. There rules shall not apply to any building three stories or less in height in cities, towns or villages having a population of less than 40,000. For the purpose of this rule, the population as determined by the then last decennial census of the United States Census Bureau shall be accepted.

21—2.2.3. Cleaning exterior face of windows from inside. These rules shall not apply to any window which is so constructed that the exterior face can be and is cleaned entirely from the inside and during which cleaning operation no part of the window cleaner's body except one arm or hand is required to project beyond the frame in which the window is set.

21—2.2.4. Windows on balconies, fire escapes and flat roofs. These rules shall not apply to any window opening on a balcony having a railing 36 inches high, nor to a window opening on a fire escape, nor to any window opening on a roof provided such roof has a pitch of not more than one inch in one foot, is six feet or more in width and is capable of safely sustaining the weight of the window cleaner and his equipment.

21—2.2.5. Cleaning inside face of windows. These rules shall apply to the cleaning of the inside face of any window where the window cleaner performs such operation while resting on a level that is six feet or more above the floor.

Otherwise these rules shall not apply to the cleaning of the inside face of any window.

21—2.2.6. Windows more than six feet above ground. Every window the lowest part of the frame of which is six feet or more above the ground shall be provided with anchors and shall be cleaned by means of such anchors and safety belts except where other safe means are permitted by these rules.

21—3. General requirements.

21—3.1. *Responsibility of employer and owner.* Windows shall be cleaned only by the methods prescribed by these rules.

The person employing, directing or permitting another to clean windows shall furnish or cause to be furnished the means for performing such work in a safe manner as required by these rules, or such other means as may be approved by the Board, except that anchors and such other approved equipment as may be affixed to and are an integral part of the building shall be provided by the owner, lessee, agent or manager.

21—3.2. *Responsibility of employee.* Window cleaners shall use the devices and means provided by these rules for their protection.

21—3.3. *Identification of manufacturer and approval number.* Unless otherwise permitted by the Board, all devices required by these rules which are manufactured on and after April 1, 1944, shall bear a name or mark which shall readily identify the manufacturer thereof and such devices which are required to be approved shall bear the approval number and such other identification as may be prescribed by the Board, in letters which are easily legible.

21—3.4. *Skilled operators for scaffolds and boatswains chairs.* Only experienced and properly trained persons shall be permitted or employed to clean windows by working on scaffolds or in boatswains chairs.

21—3.5. *Lag screws and expansion bolts.* The use of lag screws or expansion bolts as a means of fastening anchors is prohibited.

21—3.6. *Passing from window to window prohibited.* No window cleaner shall pass from one window to another window on the outside of a building.

21—3.7. *Limitation on use of safety belts and anchors.* Anchors shall be deemed adequate safety devices only where the window and its approaches are so constructed and maintained that the window cleaner can safely reach the sill and attach one belt terminal to the anchor before stepping out onto the sill and where it is possible for one belt terminal to remain attached to the anchor while the window cleaner steps back into the building.

The windows of an acid manufacturing plant or a plant where acids are generated or released in quantities that may be detrimental to the use of safety belts, or the windows of any building within 100 feet of any such plant, shall not be cleaned by means of anchors or safety belts nor shall safety belts be used where acids or other corrosive substances are used for cleaning windows except as provided in rule 21—3.8, "Use of corrosive substances."

21—3.8. *Use of corrosive substances.* Acids or other corrosive substances may be used for cleaning windows only under the following conditions:

A scaffold shall be used, and if of the swinging type, such scaffold shall be suspended by means of wire rope. The use of fibre rope of any kind is prohibited. A highly dilute solution (not more than five per cent) of hydrochloric (muriatic) or hydrofluoric acid shall be used. The cleaner shall wear rubber gloves and shall apply the solution with a brush.

All parts of the scaffolding and other equipment shall be liberally washed with water after each use to prevent corrosive reactions.

Appendix "C"

21—3.9. *Maintenance of equipment.* All equipment required by these rules shall be maintained in good repair at all times.

21—3.10. *Existing anchor installations.* Installations of anchors made prior to April 1, 1933, and all anchors which do not bear the mark of approval by the board, shall be examined by the owner. All such anchors made of cast metal and all anchors that do not comply with the dimensions herein specified and all screw fastenings that do not comply with these rules shall be removed and replaced with approved equipment not later than July 1, 1945.

21—3.11. *Inspection of manufacturer's stock.* The manufacturer's stock of approved devices shall be subject to such inspection and test by the Commissioner as he may prescribe.

21—3.12. *Shutter bars.* Shutter bars on windows covered by these rules shall be made secure for persons cleaning such windows, by means of through bolts at least three-eighths inches in diameter or by replacement of the bar or by both if necessary.

21—3.13. *Detachable draft deflectors.* Detachable draft deflectors shall be removed before the window cleaning operation is begun.

21—3.14. *Icy window sills.* Windows having sills that are coated with ice shall not be cleaned from the outside if the window cleaner is required to stand on the sill.

21—3.15. *Broken sash chains or cords.* Broken sash chains or cords shall be repaired before any person is permitted or required to clean a window having such defect.

21—3.16. *Wide fixed-sash windows.* Wide fixed-sash windows, having adjacent thereto an openable smaller

window separated by a mullion therefrom shall be required to have two anchors installed on each mullion. The window cleaner shall attach both belt terminals so as to permit one-half of the larger window to be cleaned from each side.

21—4. Installation and maintenance of anchors.

21—4.1. *Anchors for all buildings.* All windows to which these rules apply shall be provided with approved anchors, except as otherwise provided, and shall be installed as herein specified except as may otherwise be approved by the Board.

21—4.2. *Locations.* Anchors shall be attached to the side frames of the window or to the building at a point not less than 44 inches nor more than 51 inches above the window sill. Care shall be taken when screwing up anchor fastenings, to prevent producing excess stresses.

21—4.3. *Wood—existing and new buildings.* Anchors shall be attached to wood or metal-covered wood window frames by bolts of not less than three-eighths of an inch in diameter which shall pass through the entire window frame and shall be securely fastened by a nut and washer. The diameter of such washer shall be at least twice the diameter of the bolt hole. The ends of such bolts shall be upset to prevent loosening or removal of the nuts. The back face of anchors for installation in wood window frames or mullions shall be provided with at least two sharp lugs to prevent turning of the anchor after installation, or other equally effective methods may be used.

21—4.4. *Masonry—new buildings.* Anchors attached to walls of masonry units, erected after March 31, 1933, shall be installed while the wall is under construction and shall be shaped to build into the joints between masonry units. Such anchors shall not be less than eight inches

long; shall have a cross-sectional area of not less than one-quarter of a square inch; shall have a fluke or flukes having a holding surface of not less than one inch in length and shall be firmly imbedded in the masonry.

21—4.5. *Masonry—existing buildings—concrete—new and existing buildings.* On and after April 1, 1944, anchors shall not be installed in existing masonry or concrete, nor in new concrete, but shall be attached to the window frames as required by rules 21—4.3, "Wood—existing and new buildings," 21—4.6, "Hollow metal—existing and new buildings," or 21—4.7, "Solid metal—existing and new buildings."

21—4.6. *Hollow metal—existing and new buildings.* Anchors shall be attached to hollow metal construction by one of the following methods:

At least two bolts not less than three-eighths of an inch in diameter and of proper length shall pass through the frame and a steel reinforcing plate at least five-sixteenths of an inch thick, not less than six inches long and three-quarters of an inch wide, placed on the inside of the frame and secured by means of nuts and lock washers. In cases where it is impracticable to provide nuts and lock washers the reinforcing plate may be tapped to receive three-eighths inch diameter machine screws and the machine screws shall pass through the plate.

Where the screw bolt is an integral part of the anchor, it shall be at least one-half inch in diameter and shall be secured by means of a nut and lock washer and a steel reinforcing plate as described in the preceding paragraph, or it may be screwed into a tapped hole in the reinforcing plate.

All anchors and anchor fastenings shall be provided with means to prevent them from turning, backing off or becoming loose.

21—4.7. *Solid metal—existing and new buildings.* Anchors shall be attached to solid metal frames by at least two bolts not less than three-eighths of an inch in diameter and of proper length which shall pass through the frame and be secured on the inside by a nut and lock washer. However, in cases where it is impractical to provide such nuts and lock washers, the frame shall be tapped its entire thickness and the screw fastenings shall extend through the frame. In such instances at least five-sixteenths of an inch length of thread shall be provided in the frame, otherwise a tapped reinforcing plate as specified in rule 21—4.6, "Hollow metal—existing and new buildings," shall be used.

Where the screw bolt is an integral part of the anchor, it shall be at least one-half inch in diameter, and shall be secured to the frame by means of a nut and lock washer, or the frame member may be tapped through to receive the screw bolt provided the metal is at least three-eighths of an inch thick.

All anchors and anchor fastenings shall be provided with means to prevent them from turning, backing off or becoming loose.

21—4.8. *Maintenance of anchors.* The owner, lessee, agent, manager or superintendent of every public building shall maintain all anchor installations in a safe condition.

21—4.9. *Anchor material and specifications.* Anchors and anchor fastenings shall be drop forged or machined of approved corrosion resistant rolled alloy. After forging, the metal shall be properly annealed. The finished product shall be free of imperfections and all corners shall be properly filleted or rounded. Where screw fastenings are used the forgings shall be spot faced to receive the screw head.

Screws or bolts used to fasten anchors shall be made of stainless steel, copper-silicon, copper-nickel or such other

corrosion resistant metal alloy as may be approved by the Board. Screws shall have an unthreaded portion under the head not less than three-sixteenths of an inch long. Care shall be taken when screwing up anchor fastenings to prevent producing excess stress.

Anchor heads shall conform to the dimensions shown in figures Nos. 1 and 2.

21—4.9.1. Corrosion resistant metal. Corrosion resistant metal means a metal so alloyed as to provide resistance to rust and corrosion under normal atmospheric conditions. It shall be so processed as to conform to the best current practices to minimize segregation, oxides, flaws and internal stresses and shall have a minimum tensile strength of not less than 55,000 pounds per square inch with an elongation of at least 25 per cent in two inches. The zinc content of copper alloys shall not exceed five per cent. Such metal where specified to be used in the manufacture of devices herein required shall be approved.

Two tensile test bars shall be taken from each heat or batch of pieces at the time of forging or from bar stock of machined items for use by the Commissioner in performing such tests as he may deem necessary.

21—5. Safety belts.

21—5.1. *Approved safety belts to be provided.* The person employing, directing or permitting another to clean windows provided with anchors shall furnish or cause to be furnished a properly fitting approved safety belt where the cleaning of the windows requires any part of the window cleaner's body to project beyond the frame in which the window is set.

21—5.2. *Construction.* Straps used in the manufacture of safety belts shall be of woven fabric or cotton or Manila

rope and shall be made of first quality material, which shall be treated against mildew by a non-acid and non-corrosive anti-mildew agent. Stitching of the material shall be done with hot waxed, best quality linen thread and shall be lock stitching. Fabric ends shall be bound, or dipped in wax to prevent unraveling.

21—5.2.1. Approval test of safety belts. Prior to approval by the Board of a safety belt, it shall be tested as hereinafter specified. Such test shall be performed by a recognized, disinterested authority, acceptable to the board. Two copies of the complete report of the testing authority, which shall include a detailed description of the test sample, the test procedure and test results shall be submitted to the Board with the application for approval.

The complete assembly of the safety belt shall be capable of holding a 250 pound weight falling free for a distance of four feet.

In performing the test, the test weight shall be a rigid object 45 inches in girth and having a weight of 250 pounds; it shall be held by the waist band and secured by the belt buckle in the same manner as when the belt is worn by the window cleaner; one belt terminal shall be attached to a rigid anchor and the test weight shall fall free for a distance of four feet from a point in vertical alignment with the point of suspension.

A safety belt or any of its parts which have been used for testing purposes shall not thereafter be used by a window cleaner in the conduct of his work.

21—5.2.2. Metal thimbles. Metal thimbles shall be provided where straps are secured to eyes or rings. Fabric straps shall be reinforced with leather at such points of wear. Thimbles for fabric straps shall run free, shall be finished smooth throughout and shall have rounded edges.

Appendix "C"

21—5.2.3. Terminals and other metal fittings. Safety belt terminals and other metal fittings subject to stress during use shall be drop forged or machined of steel or approved corrosion resistant alloy as specified in rule 21—4.9.1, "Corrosion resistant metal." Where steel is used, it shall be made in accordance with the specifications contained in the then current standards of the American Society for Testing Materials, designation A-237 (class C). The finished product shall be free of imperfections. After forging, the metal shall be properly annealed. Such terminals and other metal fittings shall meet the strength requirements of rule 21—4.9.1, "Corrosion resistant metal." The dimensions of terminal slots shall conform to the dimensions shown on figure 3.

An approved safety catch shall be included as part of each terminal.

21—5.3. *Method of use.* Window cleaners using a safety belt shall attach one belt terminal to the anchor before stepping out onto the sill and one belt terminal shall remain attached to the anchor while stepping back into the building. During the operation of window cleaning, both belt terminals shall be attached to the anchors.

21—5.4. *Maintenance of safety belts.* Safety belts shall be maintained in good repair at all times.

All safety belts shall be frequently examined by the person employing, directing or permitting the window cleaner to clean windows, and shall also be examined by the window cleaner before use each day and no belt shall be used which does not provide safety as required by these rules.

All belts shall be so stored and handled as to prevent rust or injury thereto. No belt shall be used that has been affected by mildew, by the action of acid, or by any other corrosive or deteriorating agent.

Safety belts shall not be stored in the same room with acids.

21—5.5. *Wear and replacement.* Belt straps which have been worn so as to show broken fabric threads, shall be replaced by new straps. No belt terminal shall be used if any point in the slot will accommodate a nine-sixteenths of an inch plug gauge.

No link shall be used in the belt terminal strap if any cross sectional dimension of such link is less than 0.300 inch.

21—6. Ladders.

21—6.1. *When to be used.* Ladders shall be used for window cleaning operations only where the windows cannot otherwise be cleaned safely and practicably by means of anchors and safety belts.

21—6.2. *General use requirements.*

21—6.2.1. Means of preventing slipping. All ladders used in connection with cleaning operations shall be provided with suitable means to prevent slipping.

21—6.2.2. Person to hold ladder. Ladders more than 18 feet in length used on a public street, and elsewhere more than 24 feet in length, used in connection with window cleaning operations, shall have a person stationed at all times at the foot of the ladder to hold it in place while the window cleaner is on the ladder. Such person shall face the ladder and hold it with both hands.

21—6.3. *Specifications for all ladders.* All ladders used in connection with window cleaning operations shall conform with the following specifications:

21—6.3.1. Lumber. Wooden ladders shall be constructed of thoroughly seasoned, sound, clear and straight

grained lumber, free from shakes, cross breaks or checks over six inches long. The slope of the cross grain in finished members shall not exceed one in 15.

Rungs or steps shall be made of commercial white ash, hickory, or other material of equal strength and durability.

Side rails shall be made of eastern red spruce, Sitka spruce, fir or other material of equal strength and durability.

21—6.3.2. Rungs and rails. Rungs shall be at least one and one-eighth inches in least cross-sectional dimension between rails but in all cases they shall be capable of safely carrying the load that may be placed thereon in normal use. Wooden rungs shall fit snugly in holes not less than seven-eighths of an inch in diameter, bored through the side rails. Rungs shall be secured at each end to prevent turning. Ladders, the rungs of which have worn to three-fourths of their original thickness at any point, shall not be used. Rungs shall be spaced 12 inches center to center.

Side rails shall be finished smooth and free from splinters. Corners shall be rounded. Rails shall be at least one and one-eighth inches in thickness and shall be of sufficient depth to safely carry the loads that may be placed thereon.

21—6.3.3. Prohibition against painting. Wooden ladders shall not be painted.

21—6.3.4. Load bearing metal parts. Load bearing metal parts of all ladders shall be made of steel, wrought iron, malleable cast iron or other material of equivalent strength and durability and shall be so constructed and so secured as to safely carry the load which may be placed thereon.

21—6.4. *Additional specifications—sectional ladders.*

21—6.4.1. Locking slots. Dimensions of the locking slots at the end of the ladder shall be fifteen-sixteenths of an inch wide and two inches long. Locking slots shall be reinforced on one side with a metal plate of not less than No. 18 U. S. gauge. This plate shall be securely fastened in place. A rivet extending through the depth of the rail shall be provided above each locking slot.

Sectional joints shall be not less than one foot long and shall fit snugly without binding or unnecessary play.

21—6.4.2. Dimensions. Top ladder sections shall not exceed nine feet in length and shall be not less than four inches wide across rails at the top.

The bottom and intermediate sections shall be not more than six feet four inches long and shall otherwise conform with these rules.

The over-all length of sectional ladders shall not exceed 30 feet.

21—6.4.3. Table of governing dimensions.

Depth of rails:

Ladders not exceeding 21′ long—at least 2¾″
Ladders more than 21′ long—at least 3⅛″

Spread between rails:

Base of top section—at least 11½″
Taper of other sections—at least ¼″ per foot of length.

Size of rungs:

Not exceeding 24″ between rails—at least 1⅛″ diam.
More than 24″ between rails—at least 1-3/16″ diam.

21—7. Swinging and built up scaffolds.

21—7.1. *When to be used.* Scaffolds shall be used for window cleaning operations only where the windows of a public building cannot otherwise be cleaned safely and practicably by means of anchors and safety belts.

Appendix "C"

21—7.2. *General use requirements.*

21—7.2.1. Means of preventing swaying, and life lines. Means shall be provided to prevent swinging scaffolds from swaying. A life line shall be provided for each man working on such scaffolds.

21—7.2.2. Required strength. All scaffolds and their supports shall be properly constructed and shall have a safety factor of at least four.

21-7.3. *Specifications for swinging scaffolds.*

21—7.3.1. Railings and toeboards. Every scaffold swung from an overhead support which is 10 feet or more from the ground or floor shall be at least 20 inches in width and provided with railings on open sides and toeboards on all sides. The railing shall be two inches by three inches and at least 42 inches above the scaffold platform, with an intermediate rail. The toeboards shall be at least one inch by four inches.

21—7.3.2. Hangers, blocks and tackle. Hangers or stirrups shall be made of steel and shall be so shaped as to provide equal bearing on all bearing points. The hanger or stirrup shall be placed not less than six inches nor more than 18 inches from the end of the platform.

Rope used for the support of swinging scaffolds shall be not less than three-quarters of an inch in diameter, first quality Manila rope or the equivalent in strength and suitability. Such rope shall be reeved into proper size ball bearing or bushed pulley blocks.

Rope suspended scaffolds shall not be permitted for or near any work where acid is used, or where the upper block is more than 100 feet above the platform. Suitable padding shall be provided where necessary to prevent chafing.

21—7.4. *Built up light duty scaffolds.* Built up light duty scaffolds of the independent pole type shall be permitted for window cleaning operations. Such scaffolds shall conform to the specifications set forth in rule 23—8.2.2.2, "General requirements (pole scaffolds) table D, No. 1" found in industrial code rule No. 23, relating to the protection of persons employed in the erection, repair and demolition of buildings or structures.

21—8. Boatswains chairs.

21—8.1. *When to be used.* Boatswains chairs may be used for window cleaning operations only where the windows of a public building cannot otherwise be cleaned by means of anchors and safety belts in conformity with these rules.

21—8.2. *Specifications and method of use.* Boatswains chairs used for window cleaning operations shall be suspended from their corners and there shall be a rope or strap guard across the front and rear 18 inches above the seat, or a body belt attached to the lower tackle hook, or other fixed support shall be used. A rope tackle with not less than a single and a double sheave block with five-eighths of an inch diameter first quality cotton or Manila hemp rope shall be used for raising and lowering the chair. The blocks shall be ball bearing or bushed pulley blocks and the rope shall be connected thereto by means of a thimble and splice. A fall line shall be provided with an approved automatic locking device. A person shall be stationed at all times beneath to operate the tackle. Upper and lower tackle hooks shall be provided with means to prevent accidental disengagement.

When the chair is suspended from the roof, or when otherwise necessary, suitable padding shall be provided to prevent chafing.

Boatswain chairs and their supports shall have a factor of safety of at least four.

Appendix "C"

Appendix

Dimensions of Anchor Heads and Terminal Slots

21—4.9. Anchor heads shall conform to the dimensions shown in figures Nos. 1 and 2.*

21—5.2.3. The dimensions of terminal slots shall conform to the dimensions shown on figure No. 3.*

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* Diagrams omitted.

Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

FILED
NOV 2 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 544

ALLIED CLEANING CONTRACTORS, INC.,
Fourth-Party Defendant,
Petitioner,

—against—

ALLIED MAINTENANCE CORPORATION,
Third-Party Defendant,
Respondent-Petitioner,

—against—

TRANS WORLD AIRLINES, Defendant, and
STEVE KOZMAN, Plaintiff,
Respondents.

PETITION OF ALLIED MAINTENANCE CORPORATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

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Fourth-Party Defendant,
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—against—

ALLIED MAINTENANCE CORPORATION,
Third-Party Defendant,
Respondent-Petitioner,

—against—

TRANS WORLD AIRLINES, Defendant, and
STEVE KOZMAN, Plaintiff,
Respondents.

PETITION OF ALLIED MAINTENANCE CORPORATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Allied Maintenance Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled action on August 6, 1956, if and only if the petition for writ of certiorari of Allied Cleaning Contractors, Inc. is granted by this Court.

Opinions Below

The judgment of the District Court was entered upon a jury verdict. The majority and dissenting opinions of the United States Court of Appeals for the Second Circuit are as yet unreported and appear at pages 22 through 39 of the petition of Allied Cleaning Contractors, Inc. for writ of certiorari and the majority and dissenting memorandum decisions on the petition for rehearing in that Court are copied at page 40 thereof.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was made and entered on August 6, 1956. The order of the United States Court of Appeals for the Second Circuit denying the petition for rehearing was made and entered on August 27, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) if and only if the petition for writ of certiorari of Allied Cleaning Contractors, Inc. is granted by this Court.

Questions Presented

Allied Maintenance Corporation, defendant in the third-party action brought by Trans World Airlines, Inc. and plaintiff in the fourth-party (second third-party) action against Allied Cleaning Contractors, Inc., stands in a fortunate position in this litigation: Whether this Court affirms or reverses the judgment of the court below, ultimate liability cannot be fastened

upon Allied Maintenance Corporation, this petitioner. This is not disputed by the fourth-party defendant, Allied Cleaning Contractors, Inc.

Allied Maintenance Corporation, third-party defendant, petitions this Court for a writ of certiorari and asks that it be granted if and only if the petition for a writ of certiorari of Allied Cleaning Contractors, Inc., the fourth-party defendant, is granted by this Court, in order that the position of this petitioner in the litigation may be preserved.

Allied Cleaning Contractors, Inc. in its petition for certiorari, at pages 2 and 3, outlines the questions which it would have this Court consider. This petitioner would have this Court consider the same question, if certiorari is granted and believes that they may be reduced to two issues:

1. Whether TWA may recover indemnity from any other defendant for its violation of Section 202 of the New York Labor Law.

2. Whether the trial court improperly allowed the jury, in the third-party action of TWA against Allied Maintenance Corporation, to consider written records of physicians and a hospital embodying accounts by plaintiff Kozman as to how the accident occurred.

Statutes Involved

28 U. S. C. § 1732 (the Federal Business Records Act); N. Y. Labor Law § 202 (the Window Cleaners Statute) and Industrial Code Bulletin Rule No. 21 (the Window Cleaners Code). These are copied at pages 41 through 63 of the petition of Allied Cleaning Contractors, Inc. for a writ of certiorari.

Statement

The proceedings prior to trial, the evidence adduced at the trial and the judgments in the courts below are well and fully described in the petition of Allied Cleaning Contractors, Inc. (hereinafter referred to as Allied Cleaning). They will not be recited again here. However, the passive situation of Allied Maintenance Corporation (hereinafter referred to as Allied Maintenance), and its position as a mere "conduit" should perhaps be commented upon.

Allied Maintenance had agreed to provide Trans World Airlines (hereinafter referred to as TWA) with certain services at its hangar at LaGuardia Field, including window cleaning. This agreement provided that Allied Maintenance would indemnify TWA only for negligence, stating:

> "We (Allied Maintenance Corporation) agree to indemnify and hold you harmless from and against any and all claims, demands, charges, liabilities or damage by reason of claims for injury to, or death of persons and loss of or damage to property caused by or arising from the negligence of ourselves, our agents, servants or employees during the course of the performance of this agreement."

The actual window cleaning was performed by Allied Cleaning; Allied Maintenance did not have a single window cleaner in its employ. Kozman was an employee of Allied Cleaning; he was not at any time an employee of Allied Maintenance. Allied Cleaning is not and was not a subsidiary of Allied Maintenance. Allied Maintenance did no window

cleaning and furnished none of the equipment used by Kozman or any other window cleaner.

The facts concerning the accident can be shortly stated. Between 10:30 and 11:00 o'clock on the morning of December 15, 1950, Kozman was standing about 10 feet up on a three section window cleaner's ladder belonging to his employer, Allied Cleaning, washing the lower window panes on the outside of a TWA hangar at LaGuardia Airport. The bottom or foot of the ladder was about 3 or 3½ feet out from the hangar door resting upon a level concrete surface which extended 4 or 5 feet out from the bottom of the hangar door. The top of the ladder was resting against the hangar door.

Kozman and his witness Koslowsky testified that the four motors of the TWA plane were suddenly started and that a blast of wind "like a hurricane" blew over the ladder with Kozman on it. The ladder fell "sidewise".

Kozman specifically denied that the feet of the ladder slipped nor did any other witness testify that they did.

TWA cross-examined two physicians who treated Kozman, Drs. Wahl and Benedig, and introduced their reports to the Workmen's Compensation Board, which included accounts as to how the accident happened, into evidence.

With respect to such reports, Allied Maintenance requested and the trial court refused to charge the following:

> "4. With respect to the second cause of action, the so-called statutory cause of action,

you may not consider any statements which you find that the plaintiff may have made to Dr. Benedig, Dr. Wahl or the hospital in arriving at a verdict in respect with the third-party defendant, Allied Maintenance Corporation, and the fourth-party defendant Allied Cleaning Contractors, Inc. Any such statements, as contained in the 'histories' or elsewhere, may be considered only in the litigation between the plaintiff and the defendant, Trans World Airlines, Inc.; such statements may not be considered by you in any way in arriving at our verdict with respect to the third-part defendant, Allied Maintenance Corporation, and the fourth-party defendant, Allied Cleaning Contractors, Inc."

"6. Statements in the 'histories' of Dr. Wahl and Dr. Benedig and the hospital may not be considered by you as proof of any fact stated or inferred therein. They have no probative value. They may be considered by you only in your appraisal of the credibility of the plaintiff and his witnesses."

Although the trial court stated that it would charge the following request in different words, this was not in fact done:

"5. Questions have been asked and answers elicited about the so-called 'histories' of how the accident occurred as reflected in the records of Dr. Wahl and Dr. Benedig (and) the hospital. You may consider such evidenec in appraising the credibility of plaintiff and his witnesses and in arriving at your verdict as to whether plaintiff has establishd by a fair preponderance of the credible evidence that the accident occurred in

the manner claimed by plaintiff. You may not consider the evidence and testimony concerning the 'histories' for any other purpose and you may not find for plaintiff or against any of the defendants in this litigation unless you find that the accident occurred in the manner claimed by plaintiff, that is, that he and his ladder were blown over by a blast of air from the propellers of a plane of defendant, Trans-World Airlines, Inc."

Allied Maintenance excepted to the denial of its requests.

The jury found "against the plaintiff" on the first cause of action for common law negligence. It found for the plaintiff against TWA on the second cause of action for violation of Section 202 of the Labor Law, for TWA on its claim over against Allied Maintenance and for Allied Maintenance on its claim over against Allied Cleaning.

Reasons for Granting Writ

The reasons why this Court should grant certiorari are set forth ably and at length at pages 4 through 21 of the petition of Allied Cleaning for a writ of certiorari. It would be superfluous to repeat them here.

However, it should be pointed out that it is, in a sense, a matter of indifference to this petitioner, Allied Maintenance, how the issues urged upon this Court are ultimately resolved. For if this Court should uphold the judgment of the court below that

TWA has a claim over against this petitioner, Allied Maintenance, then this petitioner by virtue of this very holding must recover over against Allied Cleaning and this is admitted by Allied Cleaning.

Consequently, this petitioner asks that it be granted certiorari if and only if certiorari is granted Allied Cleaning in order that this petitioner may preserve its position in this litigation.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted if and only if the petition of Allied Cleaning for a writ of certiorari is granted by this Court.

Respectfully submitted,

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MENDES & MOUNT,
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KEITH BROWN,
Of Counsel.

No. 541

544

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IN THE

United States Court of Appeals

SECOND CIRCUIT

No. 330—OCTOBER TERM, 1955

STEVE KOZMAN,
Plaintiff-Appellant,

v.

TRANS WORLD AIRLINES, INC.,
Defendant-Appellant,

and

ALLIED MAINTENANCE CORPORATION,
Third-Party Defendant-Appellant,

and

ALLIED CLEANING CONTRACTORS, INC.,
Fourth-Party Defendant-Appellant.

PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

Allied Cleaning Contractors, Inc., the fourth-party defendant-appellant above named, presents this, its petition for a rehearing in the above entitled cause, and, in support thereof, respectfully shows:

I

That part of the Court's opinion of affirmance which determines that there was sufficient evidence to submit the statutory (Labor Law § 202), cause of action to the jury despite the fact that the means provided to plaintiff for the performance of his work was approved by the regulations (Industrial Code Bulletin, 21), was a clear disregard of the provisions of Section 202 and Rule 21, and the holdings of the New York Court of Appeals in *Teller* v. *Prospect Heights Hospital*, 280 N. Y. 456 and *Pollard* v. *Trivia Building Corp.*, 291 N. Y. 19.

The peculiar and dangerous circumstances which this Court sees as the factor which converted the safe means which conformed to the Code into a device abhorrent to the statute was the sudden, unexpected and unanticipated gust of air which struck plaintiff before he had a chance to avail himself of the use of an additional safeguard provided for him, a man to hold the ladder (Opinion p. 1959).

Two questions thus present themselves: (A) May a defendant be held liable for violation of Section 202 when he has provided equipment which complies with the provisions of Rule 21; and (B) can a sudden set of circumstances created by an outside agency instantaneously render means which conform to the provisions of Rule 21 improper and violative of Section 202, merely because the window cleaner's accident would not have happened as it did if he had been using some undefined and ephemeral other sort of means.

(A) This Court in its opinion determined that devices other than those specified in the Rules can nevertheless be used in violation of the Rules and thereby comply with the statute if they can "be reasonably deemed better adapted for the protection of the window cleaner." Thus,

in effect, this Court has substituted a jury for the Board of Standards and Appeals as the "authority" in determining what type of means or appliances are proper for window cleaning work; and in this case the jury was, according to the opinion, completely competent to determine that other means were more proper than ladders, without hearing one word of testimony about the propensities or capabilities of such other means.

The relegation of this function to the jury clearly disregards the provisions of Section 202 which constrains the phrases "safe means", "other means" and "safe manner" to those "required and approved by the board of standards and appeals" or "in conformity. . . . with the rules of the board."

Rule 21, itself, which as the Trial Court charged (301) has the force and effect of law (Labor Law, §28, subd. 4), clearly and explicitly commands "*windows shall be cleaned only by the methods prescribed by these rules*" (Rule 21-3.1). The trial court so charged (301).

It is thus clear that the function of determining what is safe and proper was entrusted not to the hands or fancy of a lay jury, whose understanding of the relative merits of various types of equipment must by definition be limited. On the contrary, this responsibility was exclusively delegated to a body of experts who have the capacity, capability and facilities for examining, investigating, testing and deciding which means and methods are best suited for use in a particular industry; and upon the knowledge so acquired arrive at a uniform set of standards to be followed by that industry (Labor Law § 27a, 28, 29). "That was but a permissible delegation of the power to make appropriate administrative regulations to carry out the provisions of the statute" *Burris* v. *American Chicle Co.*, 1210 F. 2d 218, 222. This delegation to the board of exclusive power to prescribe means and methods is in ac-

cordance with the statutory objective, the prevention of accidents. *Rufo* v. *Orlando*, 309 N. Y. 345, 350.

In *Teller* v. *Prospect Heights Hospital*, 280 N. Y. 456, 459 it is specifically stated that the violation of Section 202 for failure to supply "safe means" can be predicated only upon a complete failure to supply any of the means specified in Rule 21.

> "The statute does not in terms provide that anchors shall be attached to the windows of the building nor does it provide any particular device or contrivance that shall be provided to make it safe for the window washer to clean the window from the outside. *We are required to look to the Industrial Code* . . . to learn what rules of The Industrial Board are applicable, what means have been required by the Industrial Board to be furnished and what devices have been or may be approved for the safety of persons cleaning windows."

As to the excerpt from *Pollard* v. *Trivia*, 291 N. Y. 19, 23-24, which the opinion cites as authority for its holding that methods other than those specified in Rule 21 are permissible, it must be noted that such statement is dicta; and even if it were not, it would not apply to the accident in question since Rule 21-3.1 (quoted on p. 3, *supra*) as it read on December 15, 1950 (Rule 21 am. 1944) sanctioned only the methods prescribed by the rules and no others, while the same Rule 21-3.1 at the time of the *Pollard* accident (Rule 21 as am'd. 1933) read:

> "All safety devices, that are used for window cleaning operations, shall be subject to the approval of the Industrial Board.
>
> "Exception: Safety devices and methods of cleaning windows heretofore (before April 1, 1933) in use, other than those specified herein may be used if approved by the Industrial Commissioner."

A comparison of the 1933 Rules with the 1944 Rules indicates that the former Rules were designed to accomplish a gradual transition from a varied complexity of many methods and means used in the window cleaning business to a select and uniform group of methods and means without requiring industry to immediately disregard its outdated but nevertheless costly equipment. The 1944 amendment, in effect, declared that the period of transition was ended, or would end, in the immediate future and gave sanction only to those means contained in the new Rules and no others (See eg. Rules 21-3.10).

As to the last paragraph of Section 202 as authority for devices other than those specified by the Rules, a careful reading discloses that it merely states that the failure of the Board to enact Rules supplementing the Legislature's reference to anchors in the first paragraph (devices . . . to be installed on public buildings) and their complement safety belts (devices to be worn by window cleaners) does not absolve one of the duty to provide one of the other devices sanctioned by the Rules.

(B) If this Court adheres to its premise that means *specified* which comply with the Rules may nevertheless be violative of the statute, the Court must next consider whether the question of adequacy or inadequacy of the means can be made to hinge upon a sudden and unexpected set of circumstances which places the user of the otherwise adequate equipment in a position of danger to which he may or may not have been exposed if he had been using some other type of equipment.

In excusing the plaintiff's failure to have someone hold the ladder, the opinion notes that the circumstance which precipitated the accident was sudden and unexpected and arose without warning so that plaintiff was unable to call upon a man to hold the ladder.

Since the device being used by plaintiff was adequate it cannot be said to have become instantaneously inadequate merely because the accident would not have happened in the exact manner which it did if plaintiff had been using some other type of equipment. If plaintiff had been working with a belt, boatswain's chair or swinging scaffold, he undoubtedly would not have fallen to the ground when the unexpected occurred, but he may have been buffetted and battered against the hangar door. Witness what happened to Koslowsky (180).

While the proximate cause of plaintiff's fall may have been the fact that he was standing on a ladder, that fact certainly could not be the proximate cause of plaintiff's accident (*Ranney* v. *Habern Realty Corp.* 281 App. Div. 278, aff'd 306 N. Y. 820).

Section 202 does not make those charged with a duty under it the insurers of a window cleaner's safety and require them to protect him against every conceivable possibility or probability of accident. "The legislature . . . to guard against *the known hazards* of the occupation, required the employer to safeguard the workers from injury caused by faulty or inadequate equipment." *Koenig* v. *Patrick Const. Corp.*, 298 N. Y. 313, 319.

It is probable or possible that a window cleaner's ladder may be dislodged when a sidewalk cellar or sidewalk elevator door upon which the ladder rests is suddenly opened, without prior warning, or when a preoccupied pedestrian walks into it, or in a situation such as present in the case at bar, his ladder may be bumped by a TWA employee or a fellow employee. In some instances it could not be said that an inadequacy in equipment caused the accident merely because it happened, and that Section 202 had thereby been violated because the accident would not have happened had another type of equipment been used. The same applies to the case at bar. The fact that

"but for" the use of a ladder there would be no accident of the type in question does not render the use of the ladder violative of Section 202.

While considerations of expediency in sustaining plaintiff's verdict may have prompted the grafting of the bud of the common law cause of action (the sudden gust of wind) onto the stock of the Labor Law cause of action; this hasty and artificial marriage can offer no satisfaction to the matchmaker, this Court, even though the fruit born of it is sweet to the plaintiff, for it is based neither on sound logic, nor compatibility; nor even upon any theory by which the trial court charged the jury (302-303).

The amendment of the Labor Law and Rule 21 by the peculiar and sudden circumstance doctrine authored by the opinion, even though it serves to give this plaintiff's verdict legitimacy, can only serve to create confusion in place of uniformity in the window cleaning industry, and throw it back to the period before Laws, Rules and Regulations governing it were enacted.

II

If plaintiff's verdict can rest on the theory that the sudden blast of air *from TWA's plane* without any prior warning *by TWA* (opinion 1954, 1958, 1959) caused the adequate ladder to become inadequate and violative of Section 202, it must follow that TWA's liability was predicated on its "active" negligence thereby depriving it of a right of indemnity.

What is "passive" as contrasted to that which is "active" negligence is "the liability which results from the mere omission of a legal duty (which) is to be distinguished • • • from that which results from personal participation in an affirmative act of negligence or from physical connection with an act of omission by knowledge

of, or acquiescence in, it on the part of the original contractor." *Phoenix Bridge Co.* v. *Creem,* 102 App. Div. 354, aff'd 185 N. Y. 580.

Since the "negligence" found was that which resulted from the act of TWA in warming up the plane without warning, thereby causing the ladder to become inadequate where it had previously been adequate, it must follow that TWA personally participated in the combination of circumstances which this Court calls violative of Section 202. At the very least, TWA must be deemed to have physical connection with any omission to provide other devices under the circumstances, since TWA, and TWA alone, caused the circumstances to arise and failed to warn of their imminence.

It is a glaring inconsistency to hold that the suddenness of the event excused plaintiff's failure to avail himself of the use of a man to hold the ladder, a safe means provided by his employer, and at the same time determine that the employer was "actively" negligent and the precipitator of the incident "passively" negligent. On the contrary, it would appear that the employer here is the "passive" party since its equipment became "inadequate" only when unexpectedly acted upon by an agency solely and exclusively within control of TWA.

Burris v. *American Chicle Co.,* 120 F. 2d 218, is not authority which sanctions the right to indemnity in the case at bar; it is authority to the contrary.

In that case, the sole cause of the accident was the breaking of a scaffold rope supplied by the employer, Ashland, which Ashland directed plaintiff to use after plaintiff had called Ashland's attention to the rope's dangerous condition. American Chicle had no connection whatsoever with the scaffold, scaffold rope, or any circumstance which caused the accident.

> "Without any *active participation in the* wrongful acts or omissions of Ashland, Chicle has become

> responsible to the plaintiff for the consequences of Ashland's own wrong and has the right to be indemnified by the wrongdoer." (Burris, supra, p. 222)

Since the circumstance which caused the adequate ladder to become inadequate was caused solely by TWA, it would seem that TWA must be at the very least an "active" tortfeasor under the *Burris* case.

III

The opinion (p. 1960) has made reference to "an appropriate determination of seven issues among these three defendants as carefully framed by the trial judge" as justifying the jury's verdict in the impleader actions. The opinion further states "Further, the issues between TWA and the impleaded defendants as formulated by the judge in his charge make no mention of the slipping of the ladder" and as a consequence the medical reports are too trivial to be prejudicial to the impleaded defendants.

The seven issues (310), affirmative answers to which required a verdict of liability over, were not carefully framed.

The fourth issue, to which exception was taken (314), left it to the jury to decide whether TWA had supplied a telescoping scaffold as alleged in the third-party complaint. Since there was absolutely no proof that TWA did supply it, the court should have charged that TWA failed to prove this allegation.

The fifth, sixth and seventh issues, to which exceptions were also taken (314-315), referred to the propriety of the equipment and requested the jury to find whether the impleaded defendants were negligent. Since no explanation of the terms, "equipment," "proper" and "negligence" were given, the jury, for definition, of necessity had to refer back to the charge on the second cause of action, which was

made to turn solely on the question of the slippage of the ladder (303).

While this Court may turn its back and say that the doctors' reports were confined solely to the question of whether or not a wind blew as respects the first cause of action, the trial court neither in his comments before the jury (162) nor in his charge evinced any intention to so confine the reports, and in fact refused to charge to that effect (see Allied Cleaning's requests 3, 4, 13).

It is indeed strange that this court can find lack of clarity in plaintiff's testimony that the ladder did not slip and at the same time find obscurity, triviality and lack of prejudice in the mention of the ladder's slippage in the physicians' reports.

IV

In any event, the reversal of the judgment on plaintiff's first cause of action for error requires a new trial on the issues of the third and fourth party complaints.

The impleader actions turned on the question of common-law indemnity arising out of "passive" and "active" negligence.

Implicit in a verdict on the first cause of action would be a finding that TWA was "actively" negligent thereby doing away with any possible right of indemnity even if TWA could be held liable on the second cause of action, and even if it could be entitled to indemnity therefor. The parties would at the most be joint tortfeasors in pari delicto with no possible right to indemnity (Opinion p. 1959).

As between the defendants, the errors on the first cause of action have indicated a lack of proof by TWA of its "passive" negligence as contrasted to the impleaded defendants' "active" negligence, thereby rendering the determination on those matters inconclusive.

This feature's significance is highlighted by the Court's erroneous charge that Allied Maintenance obligated itself (by the contract terms) to indemnify TWA from any negligence attributable to Allied Maintenance, but not, for any negligence attributable to TWA *alone* (See *Thompson-Starret Co.* v. *Otis Elevator Co.*, 271 N. Y. 36, 41).

BERNARD KATZEN,
Attorney for Petitioner,
Fourth-Party Defendant-Appellant,

by: Raymond C. Green, of Counsel.

I, Raymond C. Green, of counsel for Bernard Katzen, attorney for fourth-party defendant-appellant, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for the purpose of delay.

RAYMOND C. GREEN.

Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153
249

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

Nos. 541 and 544

ALLIED CLEANING CONTRACTORS, INC.,
Fourth-Party Defendant,
Petitioner.

v.

ALLIED MAINTENANCE CORPORATION,
Third-Party Defendant,
Respondent-Petitioner,

v.

TRANS WORLD AIRLINES, INC., Defendant and
STEVE KOZMAN, Plaintiff,
Respondents.

BRIEF OF RESPONDENT, STEVE KOZMAN, IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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49

SUBJECT INDEX

	PAGE
Opinions Below	1
Statute and Regulation Involved	1
Statement	2
Reasons for Denying the Petitions (Argument)	2
Conclusion	17

Table of Cases Cited

Burris v. American Chicle Co., 33 F. Supp. 104, 120 F. 2d 218	14
Graver Mfg. Co. v. Linde Co., 336 U. S. 271	17
Houston Oil Co. v. Goodrich, 245 U. S. 440	16
Koenig v. Patrick Const. Corp., 298 N. Y. 313	12
Lavender, Admin'x v. Kurn, 327 U. S. 645	15
Lumbra v. United States, 290 U. S. 551	15
Osborne v. Salvation Army, 107 F. 2d 929	12, 15
Pollard v. Trivia Building Corp., 291 N. Y. 19	12, 13
Red Hook Cold Storage Co. v. Dep't of Labor, 295 N. Y. 1	12, 14
Southern Power Co. v. N. Carolina Public Ser. Co., 263 ~~629~~ U. S. 508	16
Swa[illegible]ord v. Atlantic Coast Line R. Co., 350 U. S. 807	6
Teller v. Prospect Heights Hospital, 280 N. Y. 456	12, 13, 14
Tennant v. Peoria & P. U. R. Co., 321 U. S. 29	15

Statutes Cited

	PAGE
Federal Business Records Act, 28 U. S. C. § 1732	2
New York Labor Law (30 McKinney's Consol. Laws of N. Y.)	
§ 28, subd. 4	4
§ 202	1, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

Regulation Cited

Industrial Code Rule No. 21	1, 4, 6, 7, 9, 10, 12, 13

Other Authorities Cited

Rule 19(b), Supreme Court of the United States	17
Wolfson & Kurland, "Jurisdiction of the Supreme Court"	17

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BRIEF OF RESPONDENT, STEVE KOZMAN, IN OPPOSITION

Opinions Below

The opinions of the Circuit Court of Appeals for the Second Circuit (Appendix "A" of Petition of Allied Cleaning Contractors) are reported at 236 F. (2d) 527. (Advance Sheet dated October 29, 1956.)

Statute and Regulation Involved

New York Labor Law § 202 (30 McKinney's Consolidated Laws of N. Y.) and Industrial Code Rule 21 of the New York Board of Standards and Appeals are set forth in the Petition of Allied Cleaning Contractors Inc. at page 28 and pages 44-63, respectively.

Statement

The majority opinion of the Court below [1] gives a very clear, minute and fair statement of the relevant facts.[2]

For the sake of brevity, the parties herein will hereafter be referred to by the shortened designations used in the above opinions of the U. S. Court of Appeals, as follows: Respondent, Steve Kozman, the Plaintiff below, is referred to as "Kozman"; the Respondent-Defendant-Third-Party Plaintiff, Trans World Airlines, Inc., as "TWA"; the Petitioner-Third-Party Defendant, Allied Maintenance Corporation, as "Allied Maintenance", and the Petitioner-Fourth-Party Defendant, Allied Cleaning Contractors, Inc., as "Allied Cleaning".

Reasons for Denying the Petitions

As we view it, the sole question presented is:

HAVE THE PETITIONERS CLEARLY DEMONSTRATED THAT THE COURT BELOW DECIDED AN IMPORTANT QUESTION OF NEW YORK LAW IN A MANNER IN CONFLICT WITH THE DECISIONS OF THE COURT OF APPEALS OF THE STATE OF NEW YORK?

We submit that the foregoing is the *only* question of any significance that may be presented by these Petitions. It is noteworthy to observe that while the Petitioners seek to invoke the certiorari jurisdiction of this Court by attempting to raise as a "Federal" question an error allegedly made when the Court below approved the Trial Court's reception into evidence of so-called "hearsay" statements under the Federal Business Records Act, Petitioners give

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[1] Reproduced at pp. 22-37 of Appendix "A" of Petition of Allied Cleaning Contractors Inc.

[2] Ibid. pp. 22-25

no more than initial, casual and scant treatment to this feigned "reason" in their respective Petitions. In contrast, they rely on and devote large portions of their Petitions to detailed review of the evidence and base their arguments on the *State* law and court decisions—*State* precedents which they contend were misapplied by the Court below. It is obvious from the face of the Petitions that there is no "Federal" question in this case and that the Petitions are inspired by the disappointment of litigants who are unhappy over an adverse decision.

Before stating our views on the question initally posed above, Kozman respectfully directs the attention of this Court to the fact that essentially the Petitions herein involve an internecine tug of war as between the several defendants. Each of them, as on the trial and in the Court below, seeks to avoid liability for the severe injuries sustained by Kozman because of their own biased interpretations of "indemnity" as between themselves. That this is the heart of their Petitions is evidenced by the fact that the major portions of the Petitions are devoted almost exclusively to expositions of alleged issues relating to "indemnity."[3] Be that as it may, that struggle is of no connection with Kozman. It is strictly a contest as to upon whom, among the defendants, falls the ultimate liability for the payment of Kozman's favorable jury verdict.

We are not unmindful of the care and great consideration given those questions by the Trial Court and by the Court below. We submit that the holdings of the Court below, on questions relating to "indemnity" as well as those pertaining to the alleged "hearsay" character of the hospital records and medical history statements are correct and sound. It is significant that *the Court below was unan-*

[3] Inasmuch as the Brief in Opposition of the Respondent TWA has not yet been served on Kozman, we assume that its brief will devote most of its argument to such issues.

imous in its decision on these points. We submit that in any event, whether or not the decision below was correct with respect to the rulings pertaining to the alleged "hearsay" testimony, this relatively unimportant testimony was immaterial to the result and could not have substantially altered the result. For these reasons we shall limit Kozman's brief to what we consider the only question to be answered by him.

I

Petitioners contend that Kozman did not adduce sufficient evidence to support his favorable verdict based on the second cause of action alleging a violation of § 202 of the N. Y. Labor Law.[4] They claim that although the only equipment furnished to Kozman was a bare ladder (without attachments or auxiliary means to prevent it from slipping) and that since under Code Rule 21 [5] (promulgated pursuant to § 202 and having the force and effect of law) [6], a ladder was proper equipment, there was no violation of the statute by TWA. In support of this contention they stress the thought that in the absence of evidence that the ladder slipped at the bottom, the lack of "shoes" or other auxiliary means to prevent slipping was "unimportant".

In commenting on this phase of the case the learned Court below said:

> "The evidence is clear that the top of the ladder slipped. Whether the bottom also slipped is not at all clear, although at one point Kozman testified categorically that the bottom did not slip. Still the sequence of questions and answers in which this denial appears, *read as a whole,* seems to leave the issue still in doubt; and at any rate Kozman, who was standing well up on the ladder, could hardly have

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[4] Petition of Allied Cleaning, Appendix "A", p. 28, f.n. "2".

[5] Ibid: p. 29, f.n. "3".

[6] New York Labor Law, Section 28, subd. 4.

known what happened to its feet."[7] (Emphasis supplied.)

The foregoing is a recognition of the fact that the jury took the testimony "as a whole" and considered all the circumstances, including testimony relating to weather conditions at the time of the accident, which testimony very well could have supported the jury's finding that the bottom of the ladder did slip because it could be reasonably inferred that at the time of the accident the ground might have been wet or moist—a condition conducive to the slippage of the unprotected wooden legs of the ladder.

The answer to the Petitioners' non-slippage argument was well stated in the opinion of Chief Judge Clark, when the Majority below observed:

> "* * * We may assume *arguendo,* that the ladder did not slip at the bottom (thereby making irrelevant the absence of shoes), although, as pointed out above in the statement of the facts, the evidence on this point taken in context was not conclusive. * * *"[8]
>
> "* * * But whether the ladder slipped at the bottom or was blown over at the top, *the jury was justified in finding that inadequate provision was made to prevent the ladder from falling* * * *."[9] (Emphasis supplied.)

That the slippage or non-slippage of the ladder at its bottom was not exclusively controlling in the result was aptly stated by the Court below when it concluded:

> "But as we have pointed out above, neither TWA's *nor* the impleaded defendant's liability on the Labor Law claim turns *exclusively* on the ques-

[7] Petition of Allied Cleaning, Appendix "A", p. 25.

[8] Ibid: p. 31

[9] Ibid: p. 33

> tion whether the ladder slipped at the bottom." [10] (Emphasis supplied.)

As noted by the Court below, the conclusion is inescapable that since:

> " * * * there was sufficient evidence for the jury to find *that TWA had failed in its duty to see that adequate equipment was provided to Kozman* to enable him to do his job safely, it would have been error to remove the claim based on TWA's statutory default from the jury's consideration. The jury's determination of this claim must therefore stand. See *Swafford* v. *Atlantic Coast Line R. Co.*, 350 U. S. 807." [11] (Emphasis supplied.)

Inherent in the decision below was the conclusion: the jury found that Kozman's evidence reasonably tended to prove that the ladder slipped because no means or device was furnished (within the purview of § 202 or Code Rule 21) to prevent the slippage of the ladder. On the basis of appropriate instructions by the Trial Court the jury found that Kozman's ladder was not a "ladder" unless "suitable means to prevent slipping" was provided as required by Rule 21-6.2.1.[12]

Fearful of the potential weakness of their argument that the mere furnishing of a ladder was sufficient compliance with the statute, the Petitioners have advanced the specious argument that since there were men on hand whom Kozman could have called to hold the ladder, safe and adequate equipment was provided for the job. However, the fallacy of this argument is that having a man available and "on call" to assist a window cleaner is not the same as actually *supplying* such assistance. We submit that the

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[10] Ibid: p. 36

[11] Ibid: p. 32

[12] Ibid: p. 29

Court below and the Trial Court properly interpreted "suitable means" to signify that the "person" required to hold the ladder is required, per Rule 21-6.2.2, to be "* * * at all times at the foot of the ladder to hold it in place while the window cleaner is on the ladder" and "Such person shall face the ladder and hold it with both hands." [13] That would have been the requirement had a helper of this type been required on this job. However, the point is (and both the majority and minority opinions of the Court below so agree), that "Thus no helper to hold it [the ladder] in place was required by Rule 21-6.2." [13a] Hence, in approving the verdict the Court below determined that the jury, under the applicable law, was correct in finding that the wrong device was furnished to Kozman by TWA and that such act was a proximate cause of the accident that befell him.

II

In finding that there was sufficient evidence to support the verdict of the jury, the Court below held in effect that not only was a ladder an *improper* device supplied to Kozman, but likewise that it was an *inadequate* device *under the circumstances prevailing* at the time of the accident. The violation of the law thus occurred primarily because, contrary to the language of § 202, TWA actually did "* * * require, permit, suffer or allow * * *" the work to be done by Kozman with an unsafe and inadequate "means" for cleaning windows. It disregarded that injunction. TWA knew that there was available a better-suited, safer and more adequate device. It had available on its premises a "telescope scaffold" [14] but for reasons best known to itself, made no attempt to insist upon its use. The act

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[13] Ibid: p. 29

[13a] Ibid: p. 38

[14] F.n. "1", p. 22, Appendix "A", Petition of Allied Cleaning.

of negligence attributable to it therefore was its omission to insist upon Kozman's use of the "telescope scaffold" or some better, suitable and safe means "to enable such work to be done in a safe manner." [15]

As cogently expressed by the Court below:

> "Still, although the ladder may not have been defective, it did fall when exposed to the force of the propeller wash. The jury could have found that the ladder, although in good condition, was inadequate, *in the circumstances here present*, to provide a safe method for the cleaning of the hangar windows." [16] (Emphasis supplied.)

TWA's third-party complaint against Allied Maintenance recognized this omission on the part of TWA when it charged the impleaded defendants with a violation of § 202 by allowing Kozman to use the ladder instead of "making him use *a telescoping scaffold which TWA had supplied and provided in accordance with the contract.*" [17]

That the jury, the Trial Court and the Court below recognized the attempts by all the defendants to divert attention away from the obvious fact that the ladder was not only the improper device to be used by Kozman, but that it was also an *inadequate* device, will be observed from the following statement by the Court below:

> "But whether the ladder slipped at the bottom or was blown over at the top, *the jury was justified in finding* that inadequate provision was made to prevent the ladder from falling *or that a ladder was inadequate to do the job under these circumstances.*" [18] (Emphasis supplied.)

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[15] Ibid: p. 28; 2nd sentence of § 202
[16] Ibid: p. 31
[17] Ibid: pp. 22-23
[18] Ibid: p. 33

III

Petitioners insist that TWA cannot be held to have violated § 202 because there was furnished to Kozman one of the three types of safety devices (other than "anchors") enumerated in Code Rule 21, viz.: a ladder. This, they say, was complete compliance with the statute and regulation.

The fallacy of this argument becomes apparent in the light of the fact that Petitioners cast aside in a cavalier manner a key provision of the statute that exposes the unreasonableness of their position. We refer to the last paragraph of § 202 which (1) empowers the N. Y. Board of Standards and Appeals to designate safety devices "of an approved type and strength" to be used in window cleaning operations and (2) further provides that "*the absence of any such rule shall not relieve any person from the responsibility placed on him by this Section.*"

For a clear understanding of the importance and significance of this non-exculpatory proviso we must relate it to the intent expressed in the provisions of §202 that *precede* this language and wherein are expressed the mandatory and non-delegable duties owed to the window cleaner. A close analysis thereof clearly indicates that the legislative intent, as discerned by the Court below from the New York decisions, was to place upon the persons named in the statute the absolute burden of providing such "*safe means*" as would enable such work to be done in a "*safe manner.*" In the absence of any specific language negativing the same, it is apparent that the N. Y. Legislature intended to impose such burden irrespective of such rules as the regulatory agency may or may not have made.

We submit that the purpose of § 202 and Code Rule 21, as clearly stated therein,[19] was to give the *maximum* amount

[19] See headings of § 202 and Code Rule 21, at pp. 42 and 44, respectively, Appendices "B" and "C", Petition of Allied Cleaning.

of "protection of persons engaged at window cleaning." To argue that all that is required of those charged with the duty of complying with § 202 is to furnish a mere ladder and then blandly look away in the other direction—oblivious to the inadequacy of the device and the realities of potentially dangerous working conditions—is to argue that the non-exculpatory proviso of the last paragraph of § 202 is meaningless and was of no significance when enacted into law. It is but wishful thinking to argue, as do the Petitioners, when they say [20] that this proviso was inserted "merely" to negative the idea that the failure of the regulatory agency to adopt rules relating to "anchors" does not absolve one of the duty to provide one of the other devices sanctioned by Code Rule 21. On the contrary, a reading of the language in question discloses that it clearly refers to "* * * the absence of any such rule * * *" in relation to "* * * rules supplemental to this section (by) designating *safety devices* of an approved type and strength * * *" (emphasis supplied). We submit that it is preposterous to contend that this clear language refers solely to "anchors" when the generic term "safety devices" is the term to which it actually refers. The conclusion is obvious that this contention is specious and utterly without reasonable basis.

A fortiori, where a window, by reason of its particular construction, location or as the result of adverse surrounding circumstances, etc., will not permit safe cleaning by the means of any device approved by the Board, the persons chargeable therefor under the statute are under an absolute duty to prohibit the cleaning of that window from the outside. Clearly, the Legislature intended that test to be: Does the device provided to the window cleaner enable the work to be done in a *safe manner,* and, is the device supplied *adequate* for and commensurate with the

[20] P. 11, Petition of Allied Cleaning.

risk involved under the circumstances then obtaining? This, it is clear, must be the test notwithstanding any rule, or the absence of any rule, of the Board of Standards and Appeals. Applying this construction of legislative intent to the facts of the case at bar, the Court below properly held that since TWA knew the type of window in its hangar doors, the location and manner of construction thereof, and all of the physical circumstances, including the exposure of these windows and doors to wind blasts from airplane motors, it, TWA, should have provided Kozman with some device adequate to meet the needs of such circumstances.

In making its holdings, the Court below in effect held that TWA disobeyed the injunction contained in the second sentence of § 202 which commanded that it "* * * shall not require, permit, suffer or allow any window * * * to be cleaned unless * * * means are provided to enable such work to be done in a safe manner * * *." The evidence tends to show that a safe device, namely, the "telescope scaffold" mentioned in the window cleaning contract was available and present on TWA's premises for Kozman's use, but nonetheless the fact is that TWA did "require, permit, suffer or allow" Kozman to clean the windows by the use of an ordinary window cleaner's ladder (not equipped with rubber boots or shoes or any "means" to prevent slipping) and which ladder, the jury could have concluded, was inadequate and unsafe under the circumstances then prevailing.

We submit that the Court below correctly applied the New York statute and followed the holdings of the N. Y. Court of Appeals as to the statutory intent when it said:

> "The mere fact that the use of a ladder was approved by the regulations should not be taken to establish that, in peculiar circumstances tending to make the use of a ladder unsafe to clean the windows, the party responsible for the employees' safety will

be absolved from all liability simply because it is utilized. In *Pollard* v. *Trivia Building Corp.*, 291 N. Y. 19, 23-24, 50 N. E. 2d 287, the New York Court of Appeals said: '* * * *nor does the fact that the Industrial Code specifies a particular device exclude other devices that might in a particular case be reasonably deemed better adopted for the protection of the window cleaner.*' Moreover, § 202 provides: 'The board of standards and appeals may make rules supplemental to this section by designating safety devices of an approved type and strength to be installed on public buildings or to be worn by window cleaners or both, but the absence of any rule shall not relieve any person from the responsibility placed on him by this section.' *To construe the statute narrowly to allow the use of a ladder in circumstances where its use would be dangerous would be contrary to the New York cases which say that the statute should be liberally construed to protect the workers.* See *Koenig* v. *Patrick Const. Corp.*, 298 N. Y. 313, 319, 83 N. E. 2d 133; *Red Hook Cold Storage Co.* v. *Dept. of Labor*, 295 N. Y. 1, 64 N. E. 2d 265; *Osborne* v. *Salvation Army*, 2 Cir., 107 F. 2d 929."[21] (Emphasis supplied.)

Petitioners rely on *Teller* v. *Prospect Heights Hospital*, 280 N. Y. 456, to overcome the clear and unmistakable language of *Pollard* (*supra*). They casually label as "dicta" the germane and unambiguous language of New York's highest tribunal. That Petitioners are misguided in their approach is obvious for several reasons. Firstly, *Pollard* was decided *later* (1943) than *Teller* (1939) and we must presume that the New York Court of Appeals did not utter the decisive language of *Pollard* without an awareness of its impact on its earlier decisions. Secondly, the attempt to cite *Teller* (which merely struck down a complaint for insufficiency in pleading) as authority for the narrow proposition that the safety devices prescribed by Code Rule 21 are the "only" devices that may be used, is

[21] Ibid: pp. 31-32

to distort the language of that decision primarily because that was not the holding of *Teller*. Nor did *Teller* hold that a violation of § 202 " * * * can be predicated only upon a complete failure to supply any of the means specified in Code Rule 21 * * * " as Petitioners allege. Their own quotation from *Teller* (p. 10 of Petition of Allied Cleaning) belies their contention.

Certain it is that the New York Court of Appeals knew when it decided *Pollard* that the regulatory agency issuing Code Rule 21 could not arrogate to itself the right to overrule the clear and imperative command of the Legislature as to the mandatory use of "safe means" for cleaning windows; nor did the Court, in deciding *Teller*, ignore the existence of the non-exculpatory proviso contained in the last paragraph of § 202, analyzed *supra*. The point is that the Legislature did not say in § 202 that only those devices prescribed by the regulatory agency constituted "safe means" to enable window cleaning to be done in a "safe manner." Actually it said that the means provided must be "*in conformity with the requirements of this chapter* AND the rules of the board * * * " (emphasis supplied) and in effect that if effective rules to cover any given situation were not made by that Board, no one could escape the requirement of providing "safe means." In so holding, the Court below did no more than to follow the decisions of the New York Court of Appeals and particularly the New York decision in *Pollard* where it was said, at pages 23-24:

> "It is stipulated that no safety devices of any kind, whether or not specified in the statute or in the Industrial Code, were provided by the owner or by anyone else. The statute was intended broadly for the protection of window cleaners on public buildings; *the particular method used, the particular manner in which the cleaning was done*, whether such cleaning was done by a professional or by an amateur, or one temporarily or regularly employed

for that purpose *does not as matter of law affect the responsibility of the person required to furnish such devices;* nor does the fact that the Industrial Code specifies a particular device exclude other devices that might in a particular case be reasonably deemed better adapted for the protection of the window cleaner. *Teller* v. *Prospect Heights Hospital*, 280 N. Y. 456, 459, 460, 21 N. E. 2d 504; *Burris* v. *American Chicle Co.*, D. C., 33 F. Supp. 104, affirmed, 2 Cir. 120 F. 2d 218." (Emphasis supplied.)

IV

Nor is there any substance to the contention of Allied Cleaning that the Trial Court left to the jury the actual construction of § 202, and, that it was error to charge that this statute must be construed liberally. A fair reading of that portion of the charge relating to the Labor Law cause of action indicates that the Trial Court properly gave the jury a complete explanation of the purposes and intent of the statute and the construction to be given to it. The Trial Court's assertion that § 202 "is to be construed liberally to accomplish this protection" can fairly be interpreted as an explanation by that Court as to why the language of the statute so strongly favors the window cleaner. Most certainly, that Court's statements cannot be taken as a direction to the jury to speculate as to the construction of the statute or to use its own discretion in applying it.

Notwithstanding Allied Cleaning's assertion seemingly to the contrary, and the statement contained in the dissenting opinion of Judge Hincks of the Court below, the fact is that *§ 202 is required to be construed liberally.* The decisions have uniformly so applied that canon of construction in an endeavor to apply its salutary protective provisions to the hazardous occupation in which window cleaners are employed (*Red Hook Cold Storage Co.* v. *State*

Dept. of Labor, 295 N. Y. 1; *Osborne* v. *Salvation Army,* 2nd Cir., 107 Fed. 2d 929).

* * *

It therefore follows that the Petitioners have not demonstrated that the Court below decided an important question of New York law in a manner in conflict with the decisions of the Court of Appeals of the State of New York.

We respectfully submit that this Court has laid down as governing principles that, in deciding whether a verdict should have been directed for a defendant, the reviewing court must assume as established, facts that the plaintiff's evidence reasonably tends to prove and that the Court should draw in his favor all the inferences fairly deducible by those facts (*Lumbra* v. *United States,* 290 U. S. 551), and that appellate courts "are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions * * *." *Tennant, Admin'x* v. *Peoria & P. U. R. Co.,* 321 U. S. 29 at p. 35; see also, *Lavender, Adminr.* v. *Kurn,* 327 U. S. 645, 653. Yet, the Petitioners herein in urging that the Court below erred in sustaining the Trial Court's submission to the jury of the question of compliance or non-compliance with the provisions of § 202, ignore the fact that it was highly immaterial whether or not the ladder slipped at the bottom or was blown over at the top and that the jury was justified in finding that *inadequate provision was made to prevent the ladder from falling or that a ladder was inadequate to do the job under the circumstances of Kozman's job.*

It is beyond argument that the verdict was based on positive evidence of negligence on the part of TWA and of a violation of the statute involved. This evidence was *uncontradicted.* It is significant that *none of the defendants offered any proofs* (during the course of a lengthy trial) nor did they produce any witness to contradict or disprove

the material elements of Kozman's evidence. Furthermore, they did not offer any affirmative proof to substantiate the defenses and cross-complaints interposed and merely rested at the close of Kozman's case. The only evidence emanating from the defendants was directed solely against each other and *not* against Kozman's case against TWA.

V

In the final analysis, the real gravamen of the Petitions herein is not that the Courts below committed error by incorrectly applying the law and decisions of the State of New York, but that on the particular facts of this case the result is wrong and that "justice is blind." In its attempt to persuade one that such a conclusion follows, Allied Cleaning devotes almost half of its Petition to a discussion of the evidence and factual issues.

It is well settled that this Court will usually deny certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved. Only where the case acquires importance for some other reason will the Court accept review of such a case and re-examine the facts. Otherwise the absence of a legal controversy of importance or of a direct conflict as to the factual issues will dictate a denial of certiorari in a case where merely the facts are in dispute (*Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508; *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440).

This Court is even less likely to take a case to review a factual issue *where the findings of fact made by the District Court receive the concurrence of the Court of Appeals.* In that situation this Court has often held that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of

error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275, and cases cited. (See also the array of cases in the discussion of the "Two-Court Rule" in *Wolfson* and *Kurland*, "Jurisdiction of the Supreme Court", § 333.)

We submit that the Petitioners have not established the existence of any special and important reasons of the character and within the ambit of the considerations set forth in Rule 19(b) of this Court. The conclusion is obvious that there is neither substance nor merit to the Petitions.

CONCLUSION

We respectfully submit that this Court in the exercise of sound judicial discretion should deny the Petitions herein in all respects.

Respectfully submitted,

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of Counsel.

DEC 3 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

Nos. 541 and 544

ALLIED CLEANING CONTRACTORS, INC.,
Fourth-Party Defendant,
Petitioner,

v.

ALLIED MAINTENANCE CORPORATION,
Third-Party Defendant,
Respondent-Petitioner,

v.

TRANS WORLD AIRLINES, INC., Defendant
and STEVE KOZMAN, Plaintiff,
Respondents.

BRIEF OF RESPONDENT, TRANS WORLD AIRLINES, INC., IN OPPOSITION TO PETITION OF ALLIED CLEANING CONTRACTORS, INC., AND THE CONDITIONAL PETITION OF ALLIED MAINTENANCE CORPORATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

PAGE

Opinions Below 1

Statement 2

The Facts 2

POINT I—The jury's verdict that TWA's violation of the Labor Law permitted a recovery by Kozman was amply supported by the evidence as was its further determination that TWA's negligence was of such a secondary character as to permit a recovery over against Allied Maintenance and ultimately Allied Cleaning 7

Conclusion 26

CITATIONS

Cases

Banks v. Central Hudson Gas & Electric Corp., 224 F. 2d 631, cert. den. 350 U. S. 904 ..... 8-9, 22

Burris v. American Chicle Co., 120 F. 2d 218 ..... 21, 26

Magnum v. Coty, 262 U. S. 159 26

McManus v. Board of Education of City of Rochester, 106 N. Y. S. 2d 51 24

Palmer v. Hoffman, 318 U. S. 109 25

Pollard v. Trivia Building Corp., 291 N. Y. 19 16

Wischnie v. Dorsch, 206 N. Y. 257 24

Statutes

PAGE

New York Labor Law:
- Section 28 19
- Section 29 19
- Section 30 19
- Section 202 ..... 2, 7, 9, 10, 15, 16, 18
- Section 241 ..... 23, 24

Industrial Code:
- Rule 21-3.1 ..... 17, 19
- Rule 21-6.2 12

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Opinions Below

The opinions of the Circuit Court of Appeals for the Second Circuit (Appendix "A" of Petition of Allied Cleaning Contractors) are reported at 236 F. (2d) 527. (Advance Sheet dated October 29, 1956.)

Statement

The opinion of the Court below incorporates a statement of the facts which the respondent, Trans World Airlines, Inc., hereinafter referred to as "TWA", adopts, but with necessary additional testimony.

This opinion is reprinted on pages 22-37 of Appendix A of the petition of Allied Cleaning Contractors, Inc., hereinafter referred to as "Allied Cleaning".

In addition thereto, the pertinent provisions of Section 202 of the New York State Labor Law and Associated Window Cleaning Code, upon which the entire case pivots, are reproduced in Appendix C at pages 44 to 63 of the petition of Allied Cleaning, and are further restated as a footnote to the opinion of the Court below.

The Facts

This is a simple negligence action for personal injuries. However, the plaintiff's complaint sought recovery on two separate causes of action, both sounding in negligence.

The first cause of action in the complaint (Folios 26 to 31) was a common law action for TWA's negligence.

The second cause of action was based on an alleged violation by TWA of Section 202 of the Labor Law of the State of New York.

TWA, as a third-party plaintiff, impleaded Allied Maintenance Corporation, seeking a recovery over in the event Kozman recovered on the second cause of action.

Allied Maintenance Corporation issued a second third-party action seeking a recovery over against Allied Cleaning Contractors, Inc. in the event that it, Allied Maintenance, was required to indemnify TWA.

At 10:30-11:00 A. M. on December 15, 1950 (59) Kozman, a professional window cleaner with 30 years experience (55) was hurt while cleaning windows at Hangar 4, LaGuardia Field, New York.

The plaintiff, as an Allied employee was "expected to produce as much as you (he) can" (89, 147). The accident occurred on Friday, December 15, 1950 (57). Kozman had been working on this job since Monday (57). On the day of the accident he arrived on the job at 6 A. M. (58) and worked up until the time of the accident (58-59) on the outside of TWA's hangar (95, 96, 103). After 10 A. M. (accident 10:30-11:00 A. M.) on Friday, December 15, 1950 there were *five* window cleaners on the premises (64). The ladder was on a slant (96). If the ladder was slanted too much Kozman would not do the job or would wait until somebody came and helped him (97). That person would hold the ladder and act as a chock for it (97). If *it was wet and slippery he had somebody holding the ladder* (97). That had been his practice on many occasions earlier (97). But on that day he did not have anybody holding his ladder (97, 104).

During the work week he had observed TWA employees repairing airplanes inside the hangar (98, 99) and outside the hangar (99). During that week he had seen men fixing the motors of the airplanes and operating them one at a time (100). He claimed they never operated the engines

at full power (100). The day prior to the accident they did operate the motors at full power (101) and the big hangar doors (80 feet by 40 feet) (102) were shaking. After the planes were fixed they were jeeped or taxied away (102).

On the day before the accident at approximately the same time as the accident occurred (10:45 A. M.) (150) the same wind and noise occurred at the time when window cleaner Koslowski was up on a ladder (159-160) and 2 men had to help hold the ladder. The weather on that day was fair (150). At the time of the accident, however, the ground was wet from snow and rain (TWA's Exhibit B).

Kozman further testified that during his 30 years experience in the window cleaning business if there was a condition which would cause his ladder to slip he would have somebody hold the ladder for him (161, 163, 164). Mr. Green representing Allied Cleaning Contractors, Kozman's employer, under the guise of cross-examination questioned the plaintiff as follows:

> "Q. Mr. Kozman, did this ladder slip from the feet? A. It *did*. As it started falling, I was working on it . . .
>
> • • • •
>
> Q. Did the ladder slip from the bottom? Did the feet slip? A. It *slipped to the right side*. I was blown off.
>
> Mr. Green: I move to strike it out.
>
> Q. My question was, sir, did the feet of the (335) ladder slip? A. No." (165)

TWA's Exhibit B, the Official United States Weather Bureau Report states that snow had been falling during

the 2½ hours preceding the accident; at 10:40 A. M. occasional snow flakes were falling accompanied by light rain.

Various medical evidence was introduced at the trial. The record of the Queens General Hospital was admitted in evidence as Plaintiff's Exhibit 5. The history contained therein was introduced as TWA's Exhibit F. It contained no reference to slipping or prop wash. In addition, Dr. Stephen Wahl, the treating physician for plaintiff testified he had treated plaintiff from January 19, 1951 to March 7, 1952 (112). During this period he was required to submit reports to certain sub-divisions of the State of New York. Those reports required him to state in substance how the accident occurred (112). In those reports the doctor stated that the patient told him "slipped with ladder"—no reference to a big wind (113-114).

Similarly Dr. Arpad Bendig testified for plaintiff to the effect that Kozman had stated "the ladder slipped and fell" (132).

It should be noted that the proceedings prior to trial are important, since they color the entire trial and reflect quite clearly the community of interest between the plaintiff and the two impleaded defendants.

Kozman, a simple window cleaner, was an employee of one of the Allied's for thirteen years (57). He wasn't sure which Allied it was (55). In June of 1952, Allied Maintenance first appeared in the litigation in answer to TWA's third party complaint (23). About six months later, Bernard Katzen's office was substituted for Mendes and Mount, Allied Maintenance's attorneys (25).

They continued to represent Allied Maintenance until the eve of trial in October, 1955 when, rather surprisingly,

they switched again with Mendes and Mount, and even more surprisingly, they then appeared in the litigation as counsel for Allied Cleaning Contractors and defended the suit against Allied Cleaning Contractors, which had just been commenced by the clients whom they had represented in the litigation for almost three years. The implications are obvious that the suit between the two Allied companies is something of a fiction or device.

Kozman is an employee of one of them and in view of the fact that some Allied company stands to recoup the compensation payments if he recovers, they have a substantial interest in his recovery. He is still their employee and they had a very real degree of control over him.

TWA was, of course, the only stranger in the lawsuit. It is an airline, and its business is to operate passenger airlines. In the performance of its business it necessarily must store, repair, test, warm up, taxi and operate aircraft. This comes not only from the nature of the business but is dictated by the stringent rules and procedures of the Civil Aeronautics Administration.

As a comparatively minor portion of its housekeeping operation, TWA also tried to keep its windows clean. To do this, it entered into a contract with Allied Maintenance Corp. wherein for the sum of $700 a month, Allied was to perform this service. The contract included the following terms (TWA Ex. A):

> "We will supply all necessary supplies, labor and equipment necessary to perform this service in a thorough and workmanlike manner.
>
> • • • •

> "We agree to indemnify and hold you harmless from and against any and all claims, demands, charges, liabilities or damage by reason of claims for injury to, or death of persons and loss of or damage to property caused by or arising from the negligence of ourselves, our agents, servants or employees during the course of the performance of this agreement."

Another clause of the contract permitted Allied Maintenance the use of a telescope scaffold owned by TWA which was located on the premises and which they "agreed to use at their own risk."

POINT I

The jury's verdict that TWA's violation of the Labor Law permitted a recovery by Kozman was amply supported by the evidence as was its further determination that TWA's negligence was of such a secondary character as to permit a recovery over against Allied Maintenance and ultimately Allied Cleaning.

Although ostensibly the petitioners purport to present six separately stated issues, it is obvious their chief concern is an attempt to have the Supreme Court review the application of Section 202 of the New York State Labor Law to a particular fact situation.

Such labored attempts to create Federal questions as are presented in the petitions are little pursued with the net result that in effect, they abandon them and simply request a third examination of the evidence in the case to

see whether it will sustain the jury's verdict and the affirmance of that verdict by the Second Circuit Court of Appeals.

There is no Federal question involved; and the question that is involved was one peculiarly within the ken of the Second Circuit, since we are concerned only with the local application of New York Labor laws.

The unsound arguments advanced are based on the arbitrary and unrealistic selection of certain facts to the exclusion of any consideration of the overall effect of the entire evidence. In the same fashion do they treat Section 202 and the related code, when they adopt that portion of it which specifies a ladder as approved equipment but ignore the concomitant requirement that if ladders are used suitable means shall be provided to prevent slipping (Appendix C p. 58).

In an attempt to supply the necessary reviewable questions they manufacture issues both of fact (whether the ladder slipped from the bottom) and of law (whether the indemnity agreement purported to indemnify TWA for TWA's negligence).

As a final resort they make reckless charges that the Circuit Court has in its decision given rise to yet another instance of its complete disregard of the rights of impleaded defendants and its unconcern about them (p. 21 of Allied Cleaning's petition).

Actually there is wry humor in this charge that justice is blind, and that the Circuit Court's "insight into injustice" dimmed by the time it reached the fourth party defendant, since on page 21 of their brief, wherein they make this charge, they cite *Banks* v. *Central Hudson Gas*

& Electric Corporation, 224 F. 2d 631, *cert. den.* 350 U. S. 904, which is a case which demonstrates vividly how this very same Circuit Court, within a matter of months of deciding the instant case, scrupulously defended the rights of third party defendants to the point where it ordered a new trial on certain issues involving the third party defendants.

The fact of the matter is the Second Circuit did what it and the jury was required to do, and that is, reach a verdict on *all* the facts and circumstances of the case.

While the inferences and conclusions sought to be imposed on these facts and circumstances by the petitioners, are contrary to the inferences drawn by the jury, this is a matter peculiarly within the province of a jury.

Stated even more simply, this is the very reason we have juries.

Pervading the entire argument of the Allieds is their dogmatic assertion that since Section 202 and the accompanying rules of the Board of Standards and Appeals provide, among other things, that a ladder may be used for the cleaning of windows, the requirements of the statute were met by TWA when Allied Cleaning provided that ladder.

What they do not appreciate, is the fact that Section 202 and the concomitant rules impose obligations far more stringent than the mere supplying of enumerated types of equipment. The "safe means" is the end result sought by Section 202 whether it be a ladder, scaffold, boatswains chair, or other approved device.

No appreciation of this can be had without reference to the provisions of Section 202 and the rules.

Section 202 in itself provides that the owner or lessee shall install and maintain anchors "or provide other safe means for the cleaning of the windows of such building as may be required and approved by the Board of Standards and Appeals".

In addition, it forbids the owner or lessee from permitting the windows to be cleaned "unless such anchors or other safe means are provided to enable such work to be done in a safe manner in conformity with the requirements of this chapter and of the rules of the Board of Standards and Appeals".

To be sure, a ladder is one of the four means specifically enumerated and approved by the rules. Whether it be a safe means, however, necessarily involves the circumstances of its use, and in that connection, we must consider, as did the jury, those circumstances.

We know from the Weather Report of LaGuardia Field (TWA Exhibit B) that from at least 0802 until well beyond the time of the accident, rain and intermittent snow were falling on the field.

The synoptic observations summarizing the report indicates that rain fell from 0414 to 0640; snow from 0800 to 0920; rain and snow from 0920 to 1043 and rain from 1115 to 1238 (TWA Exhibit B).

Moreover as the picture shows (TWA Exhibit I), a portion of the paving in front of the hangar is on a slant. Kozman admitted this, but anticipating the damage implicit therein, he insisted the ground between the door sill and

the beginning of the slant was level for 4-5 feet (104). He placed the bottom of the ladder 3½ feet out from the door (105). This is a surprisingly short distance for an 18 foot ladder to be placed from the base and raises the question of its instability when placed at such an acute angle (105). Moreover, taking even Kozman's figures, the feet of the ladder were only about ½ foot from the slant.

Of course the jury didn't have to take his estimates particularly since they had the picture and could draw their own conclusions.

In addition, commencing with the plaintiff's complaint which alleged that the ladder slipped along the side of the door, through and including Kozman's testimony at the trial, there has never been any question but that the ladder was unattended and it slipped—whether from the top or bottom or both.

The myriad circumstances attending the use of ladders has never been attempted to be defined by Section 202 and the associated Industrial Code. This stems from two reasons: first, had they attempted to define problems of slippage, they would have only narrowed the all inclusive mandate to prevent slipping which was their purpose; secondly, it is something which defies definition or enumeration. This for the reason that an infinite variety of situations can be presented in the use of a ladder, since necessarily the physical circumstances of the locale of its use are always a factor. We refer here to weather conditions, including problems arising from rain, snow, ice and wind. In addition, the building or structure which is involved can present many situations to say nothing of the surface upon which the feet or the top of the ladder is to rest.

Recognizing these difficulties, Industrial Code Rule 21-6.2 entitled "General Use Requirements", merely stated as follows:

> "21-6.2.1. *Means of preventing slipping.* All ladders used in connection with cleaning operations shall be provided with suitable means to prevent slipping." (Appendix C p. 58)

No further definition of the suitable means to prevent slipping is attempted.

Petitioners' basic contention is that the plaintiff did not adduce sufficient evidence to support the verdict based on the second cause of action.

From this basic argument, and to support it, they create the false issue that there was no evidence that the ladder slipped at the bottom, and therefore the lack of shoes or other means to prevent slipping was not a factor in the case, and that since they had provided the ladder, there was no violation by TWA of its duty to supply "other safe means."

However, there has never been any issue but that the ladder slipped, whether from the top or bottom, being relatively unimportant.

It must be borne in mind that the top of the ladder rested on glass windowpanes, and the foot of the ladder, which was not equipped with boots, rested on a surface which was wet and slippery from snow and rain.

Moreover, at or near the place where the foot of the ladder was placed, the surface of the ground canted.

To be sure, Kozman testified that he had the foot of the ladder 3½ feet out from the sill, and that the area where the ground slanted was about 4-5 feet out.

However, his estimates of these distances are subject to the jury's determination, particularly in view of the fact that the jury had pictures of the area before it (TWA's Exhibit I) which contraindicate or gainsay such statements.

The Second Circuit in commenting on this argument about the slipping said:

> "The evidence is clear that the top of the ladder slipped. Whether the bottom also slipped is not at all clear, although at one point Kozman testified categorically that the bottom did not slip. Still the sequence of questions and answers in which this denial appears, read as a whole, seems to leave the issue still in doubt; and at any rate, Kozman who was standing well up on the ladder, could hardly have known what happened to its feet." (Appendix A, page 25)

In any event, the jury was entitled to take and consider all the testimony and all the exhibits before it, including the pictures and the weather reports, and it was this appreciation of the jury's role as fact finders which prompted the Court below to observe:

> " * * * We may assume arguendo, that the ladder did not slip at the bottom (thereby making irrelevant the absence of shoes), although, as pointed out above in the statement of the facts, the evidence at this point taken in context was not conclusive * * *."

* * * *

> "* * * But whether the ladder slipped at the bottom or was blown over at the top, the jury was justified in finding that inadequate provision was made to prevent the ladder from falling or that a ladder was inadequate to do the job under these circumstances" (Appendix A, pp. 31 and 33).

Slippage was not the issue submitted to the jury between TWA and Allied Maintenance and Allied Cleaning, but rather in seven carefully framed issues, the Trial Court requested the jury to determine whether or not, in view of all the circumstances, TWA had failed in its duty to see that adequate equipment was provided, and further, whether the employer providing the equipment had failed to do so.

The falling of the ladder was the end result of the failure to provide a safe means to clean those windows at that place on that day.

In commenting on this point, the Court stated:

> "As we have pointed out above, neither TWA's nor the impleaded defendants' liability on the labor law claim turns exclusively on the question whether the ladder slipped at the bottom. Further, the issues between TWA and the impleaded defendants as formulated by the judge in his charge make no mention of the slipping of the ladder * * *". (Appendix A, p. 36)

The Court below affirmed the jury's finding when it said:

> "Since therefore there was sufficient evidence for the jury to find that TWA had failed in its duty to see that adequate equipment was provided to Kozman to enable him to do his job safely, it would have been error to remove the claim based upon TWA's

> statutory default from the jury's consideration. The jury's determination of this claim must therefore stand. See *Swafford* v. *Atlantic Coastline R. Co.*, 350 U. S. 807." (Appendix A, p. 32)

We note that in an effort to buttress the argument that the mere providing of a ladder is a discharge of all obligation under Section 202, the petitioner, Allied Cleaning, hypothesizes other fact situations, wherein a ladder might be caused to fall though it was a safe means to do the particular job involved.

The examples put forward are a ladder placed on sidewalk covers over an elevator, and also the situation where a pedestrian bumps the ladder.

Just as easily can we hypothesize the situation wherein the ladder is placed on an icy sidewalk (and in view of the weather conditions, this is closer to the facts of this case), or else the top of the ladder is placed on a projection or a surface which is inadequate to support it under normal use, or even more simply using a ladder on a windy day.

These hypothetical situations expose the fallacy of the argument that a jury is not entitled to take all the surrounding facts and circumstances into consideration when determining whether a safe means has been supplied or used.

No instrument is so good that it cannot be a source of danger if improperly used under unfavorable conditions. The argument that a ladder *per se* is full compliance with the purpose of the statute so that no jury question can be presented falls of its own weight.

Petitioners claim that the Trial Court erred in that it left to the jury the actual construction of Section 202, substituting therefor a jury rather than the Board of Standards as the body to decide what are safe means.

In argument, the petitioners make the outrageous statement that the Court below determined that devices, other than those specified in the rules, can nevertheless be used in violation of the rules, if they can reasonably be deemed better adapted for the use of the window cleaner; that in effect, the Circuit Court is substituting a jury as the authority in determining what type of appliances are proper for window cleaning work.

This is amply answered by the fact that even where there is no doubt that Section 202 has been violated, the case still must be submitted to a jury to determine whether that violation was a proximate cause of the accident or injury. *Pollard* v. *Trivia*, 291 N. Y. 19, 50 N. E. 2d 287.

That conflicting facts and the inferences to be drawn from them are solely within the province of a jury is beyond dispute.

In this case, the Court was necessarily constrained to permit the jury to decide whether or not the "safe means" was supplied in view of the circumstances prevailing.

The Court charged on several occasions the necessity of not only determining the existence of a violation under the Labor Law, but whether that violation was a proximate cause of the accident (303, 304, 305, 309, 310, 311).

It even pointed out to the jury the possibility of several proximate causes (298), quite properly leaving it to them

to determine which, if any, such proximate causes it found to be the responsibility of TWA and the impleaded defendants.

In view of the evidence in the case, the statement in the opinion of the Court below that "The jury was justified in finding that inadequate provision was made to prevent the ladder from falling or that the ladder was inadequate to do the job under these circumstances" indicates quite clearly that the jury properly discharged the only function it was assigned by the Trial Court.

It did not purport to set up other means, since it simply decided that the means provided were not adequate.

In insisting that the rules are so rigid as to permit only four means any one of which is deemed adequate and safe *per se,* the petition overlooks some pertinent provisions of the rules.

Rule 21-3.1. provides that "The person employing, directing or permitting anyone to clean windows shall furnish or cause to be furnished the means for performing such work in a safe manner as required by these rules, or such other means as may be approved by the Board, except that anchors and such other approved equipment as may be affixed to and are an integral part of the building shall be supplied by the owner, lessee, agent or manager".

We note immediately that the rules quite reasonably impose upon the building owner or lessee the responsibility of affixing anchors or other equipment which by their nature become a part of the building.

However, when equipment not an integral part of the building is involved, the person employing or directing is

also charged with furnishing the means for performing such work "in a safe manner" as required by these rules or "such other means as may be approved by the Board".

This rule, when taken in conjunction with the last paragraph of Section 202, which permits the Board of Standards and Appeals to "make rules supplemental to this section by designating safety devices of an approved type and strength to be installed on public buildings, or to be worn by window cleaners or both, but in the absence of any such rule, shall not relieve any person from the responsibility placed on him by this section", clearly was intended to provide for the situation where a dogmatic use of either ladders, scaffolds, etc. as enumerated in the rules, with nothing further, could, because of prevailing circumstances, not be a "safe means".

In view of the beneficent purpose of Section 202 to protect window cleaners engaged in an ultra-hazardous occupation, despite their own shortcomings, it is most reasonable to find, as did the Second Circuit, that the mere supplying of one of the itemized pieces of equipment with nothing further, if something further is called for by the circumstances, is not a complete discharge of the duties imposed upon owners and employers under Section 202 and the related code.

To particularize is, of course, to narrow, and hence, we are somewhat suspicious of the pious claims of the petitioners that the decision in this case by the Circuit Court upsets the standardization that is supposedly desirable in the window cleaning industry, and moreover, that while the instant decision might benefit Kozman, it exposes all

other window cleaners to future hazards arising from the use of unapproved equipment.

As we view the Circuit Court's decision, it has just the contrary effect—since it interprets most strictly the obligation to provide "safe means" as distinguished from the obligation to provide simply a ladder or scaffold, whether or not they be safe means for that job.

The opinion is in no way authority for the use of unapproved equipment.

In the event that either anchors, anchors and belts, scaffolds, ladders or boatswains' chairs, are not suitable for any particular job, those responsible can use other means provided they are approved by the Board under the terms of Rule 21-3.1. Also a variation can be sought from the Board of Standards and Appeals under the provisions of the Code or Section 28, 29 and 30 of the Labor Law.

The New York courts have also refused to approve the narrow holding that the mere use of an approved ladder *per se* discharges the obligation to provide safe means, and the Court below so stated:

> "Still, although the ladder may not have been defective, it did fall when exposed to the force of the propeller wash. The jury could have found that the ladder, although in good condition, was inadequate, in the circumstances here present, to provide a safe method for the cleaning of the hangar windows.
>
> "The mere fact that the use of a ladder was approved by the regulations should not be taken to establish that, in peculiar circumstances tending to make the use of a ladder unsafe to clean the windows, the party responsible for the employees'

> safety will be absolved from all liability simply because it is utilized. In *Pollard* v. *Trivia Building Corp.*, 291 N. Y. 19, 23-24, 50 N. E. 2d 287, the New York Court of Appeals said: ' * * * nor does the fact that the Industrial Code specifies a particular device exclude other devices that might in a particular case be reasonably deemed better adapted for the protection of the window cleaner.' Moreover, Section 202 provides: 'The board of standards and appeals may make rules supplemental to this section by designating safety devices of an approved type and strength to be installed on public buildings or to be worn by window cleaners or both, but the absence of any rule shall not relieve any person from the responsibility placed on him by this section.' To construe the statute narrowly to allow the use of a ladder in circumstances where its use would be dangerous would be contrary to the New York cases which say that the statute should be liberally construed to protect the workers. See *Koenig* v. *Patrick Const. Corp.*, 298 N. Y. 313, 319, 83 N. E. 2d 133; *Red Hook Cold Storage Co. v. Dept. of Labor*, 295 N. Y. 1, 64 N. E. 2d 265; *Osborne* v. *Salvation Army*, 2 Cir., 107 F. 2d 929." (Appendix A p. 31, 32).

Petitioners also seek to establish, despite the jury's determination to the contrary, that TWA was actively negligent, and hence, that it has no right of indemnity, whether by way of contract or under the common law.

It very misleadingly raises the false issue that the contract of indemnity may not be spelled out to mean that Allied agreed to indemnify TWA for TWA's negligence, in the absence of an explicit contract provision so providing.

With this we have no quarrel, but point out that that was not the basis upon which indemnity was sought.

In this case, the question of indemnity was presented to the jury on the grounds that Allied Maintenance had agreed in its contract to indemnify TWA for Allied Maintenance's negligence, or that of its agents, which would embrace Allied Cleaning.

Even without the contract of indemnity this same submission would be justified under common law rules. *Burris* v. *American Chicle,* 120 F. 2d 218.

To be sure, there can be no indemnity in this situation if the jury had found that TWA's conduct amounted to active negligence, and moreover, that the active negligence was a proximate cause of the accident.

However, as already indicated, the case was submitted to the jury with several charges on the subject of proximate cause, and in addition, when the Court charged on the issues between TWA and the impleaded defendants, it very carefully pointed out as follows:

> "Thus, if you should find that the defendant TWA was primarily negligent and that the negligence caused the accident, then you may not give TWA a verdict against Allied Maintenance or Allied Maintenance a verdict against Allied Cleaning Contractors, Inc." (309)

Again in the sixth and seventh issues presented to the jury (310), the Court cautioned that the jury must determine not only the negligence of Allied Cleaning or Allied Maintenance, but further that the negligence proximately resulted in the accident. Still again practically the

last thing the jury was told was that "if you should find that the accident was caused by a violation of the Labor Law and not as a result of common law negligence (which had been explained) and Allied Maintenance Corporation through Allied Cleaning Contractors was responsible therefor" then their verdict should ultimately be against Allied Cleaning (311).

In short, as was stated in the case of *Banks* v. *Central Hudson Gas & Electric Corp., supra,* the question of primary and secondary negligence is peculiarly one for a jury:

> "It is the function of the jury to determine whether both defendants were guilty of negligence contributing to the harm: if so, to determine whether they were equally at fault, in which event no right of indemnity exists. If, however, the jury finds that the fault of the third party plaintiff was passive only and that the fault of the impleaded defendant was the primary cause of the harm, the latter will be held to indemnify the former in an action over * * *"

The jury found just this. In view of the fact that the business of TWA was airplanes, not window cleaning, the verdict was eminently just.

In the absence of special verdict requests (considered but significantly abandoned by Mr. Green, Allied Cleaning's trial counsel [246]), it is idle for petitioners to speculate that the jury might have (1) found that there was a slipstream, (2) that the slipstream was negligently caused, and (3) that the negligence was the proximate cause of the accident.

This for the reason that in view of the fact that the jury is the sole judge of the credibility of witnesses and the

weight to be accorded evidence, their rejection of the common law cause of action and their verdict over for TWA on the second cause of action, is an implicit rejection of the slipstream; either as to its bare existence, its negligence, or its being a proximate cause.

In view of the sharp attack made on Kozman's credibility based on his several admissions that the ladder fell without mentioning prop wash, together with the evidence that the pavement was in a wet, slippery and slanted condition, there was ample evidence to sustain a conclusion that the prop wash was not a factor, if in fact it existed at all.

No matter how we speculate, it cannot be denied that the two verdicts for TWA eloquently and completely proclaim that the jury rejected the prop wash as an active, primary cause of the accident.

The Court of Appeals quite correctly noted that the only question of law involved in the entire case was whether TWA, *by its default under the Labor Law,* was actively negligent and, therefore, not entitled to indemnity. (Appendix A, p. 33)

They reviewed this subject at length in the opinion, since the petitioners in the Court below had made a very strong but unsuccessful effort to prove that it was the rule of New York that anyone who violated a non-delegable duty under any section of New York's Labor Law was an active tortfeasor not entitled to indemnity.

However, to buttress this argument they were only able to present New York cases dealing with an interpretation of Section 241 of the New York Labor Law.

That section is concerned with certain standards set up in the field of construction and demolition.

Specifically, it specified five safety precautions which must be taken, including such items as temporary planking over floor levels of building projects, enclosing elevator shafts, etc. New York imposes upon an owner the duty of enforcing this section without right of indemnity against the contractor.

Allied Cleaning's attorneys have presented this argument to New York courts in other cases, and twice they have been rebuffed, *Wischnie* v. *Dorsch*, 296 N. Y. 257; *McManus* v. *Board of Education of the City of Rochester*, 106 N. Y. S. 2d 51.

New York has repeatedly refused to extend the rule of no indemnity wherein violations of §241 are involved to other sections of the Labor Law.

The cases we presented to the Circuit Court to support this are the nine odd cases cited in the opinion of the Court below. (Appendix A, p. 34)

Further discussion is not warranted on a point so repeatedly rejected by the New York courts.

From the foregoing, it must follow that the petitioners have not presented a question appropriate for review by the Supreme Court since only evidentiary questions are involved.

Even a cursory glance at the elements necessary for the Supreme Court to review the decision of a Court of Appeals, indicates that those special and important reasons outlined in Rule 19 of the rules of the Supreme Court are here completely lacking.

Basically the petitioners asked this Court to review the application by the lower Federal courts of a local New York State statute to a particular fact and pleading situation.

That the petitioners may be disappointed over the adverse decisions has never been a reason for the extraordinary relief of certiorari.

Moreover, the only fair purport of the petitions is to the effect that they seek a change in the inferences drawn by a jury—and affirmed by the Circuit Court—from a particular set of facts.

In addition, the decision of the Circuit Court insofar as questions of law are concerned, involve their applying local law.

The Second Circuit sitting in New York is particularly qualified to determine these questions of local law, and their decisions involving such questions are not ordinarily reviewable except on a plain showing of error. *Palmer* v. *Hoffman*, 318 U. S. 109.

Since it is axiomatic that certiorari to review a judgment, however important it may be to the petitioners, will not be granted when the petitions do not involve a question of gravity and general importance, and there is no conflict between the decisions of State and Federal Courts or between those of Federal courts of different circuits, the petitioners do not present valid questions for review.

The questions presented, when analyzed under a correct interpretation of the New York Labor Law, are entirely questions of fact determined by the Court of Appeals adversely to the petitioners after a full review of the evidence.

Jurisdiction to bring up cases by certiorari "was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing". *Magnum Co.* v. *Coty*, 262 U. S. 159, 163. Nor is any question of transcending public importance present.

The Court of Appeals did not depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The complete harmony between the New York State Courts and the Second Circuit is rather patently demonstrated by the fact that New York has twice cited the *Burris* v. *American Chicle, supra* case with approval.

CONCLUSION

The petitions should be denied in all respects.

Respectfully submitted,

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